TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 60

PAUL POE, ET AL., APPELLANTS,

vs.

ABRAHAM S. ULLMAN, STATE'S ATTORNEY.

No. 61

C. LEE BUXTON, APPELLANT,

vs.

ABRAHAM S. ULLMAN, STATE'S ATTORNEY.

APPEALS FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

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[fol. 1]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY STATE OF CONNECTICUT

PAUL POE et al.,

vs.

ABRAHAM S. ULLMAN, State's Attorney.

COMPLAINT—Filed May 22, 1958

To the Sheriff of the County of New Haven, or His Deputy—

Greetings:

By authority of the State of Connecticut you are hereby commanded to summon Abraham S. Ullman of the Town of Hamden, County of New Haven, and State of Connecticut, as he is State's Attorney in and for the County of New Haven, to appear before the Superior Court to be held at New Haven, within and for the County of New Haven, [fol. 2] on the First Tuesday of June, 1958, then and there to answer unto Paul Poe and Pauline Poe, of the Town of New Haven, in said County, and State, in a civil action wherein the plaintiffs complain and say:

1. The plaintiffs are a husband and wife who live together in the Town of New Haven. Mr. Poe is a businessman and his wife is a housewife. Mrs. Poe is 26 years old; Mr. Poe is 30 years old. They have no living children.

2. The plaintiffs consulted as a physician Dr. C. Lee Buxton, hereinafter referred to as said physician, who is and has been a Board-certified specialist in Obstetrics and Gynecology since the year 1940 and is at present Professor and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and of the Obstetrical Service of the Grace-New Haven Community Hospital.

3. The plaintiffs consulted said physician particularly concerning an apparent genetic problem. Mrs. Poe has had three consecutive pregnancies, each of which has terminated in an infant with multiple congenital abnormalities inconsistent with life. The Poes' first infant was delivered on January 31, 1954, with congenital heart disease and kidney abnormality. It died after nine days of life. Their second child was born on April 14, 1955, and was a mongoloid with associated renal and cardiac lesions. It expired within six days. Their third child was born on October 17, 1957, with evidence of cerebral and gastro-intestinal mal-development. After ten weeks in a nursing home, it perished. Even had these children survived, it would be highly unlikely that any of them would have been able to lead a normal or sound life. Plaintiffs have suffered great emotional stress from these successive failures and would undergo severe strain were another such tragedy to occur. The basic cause of these abnormalities is thought by Dr. Buxton and other consultant specialists to be genetic, but the underlying mechanism is as yet unclear, thereby seriously impeding prognosis, prevention and/or treatment.

4. The existence of such genetic condition as described in Paragraph 3 hereof, until knowledge of its ultimate nature and functioning may be established and applied, renders another pregnancy extremely disturbing to the [fol. 3] physical and mental health of the plaintiffs in that such pregnancy, carrying unknown and incalculable possibilities of producing another such monstrous infant, makes the likelihood of psychological stress beyond the breaking point, on the part of either or both of the plaintiffs, a probable consequence.

5. Plaintiffs need and require and have asked said physician for medical advice as to what preventive measures can be taken to avert the occurrence of the dangerous condition specified in Paragraph 4 hereof.

6. The plaintiffs have knowledge of the fact that it is the opinion of said physician that the best and safest medical treatment which could be prescribed would be to inform them as to methods of preventing conception. Said physi-

can has knowledge of drugs, medicinal articles and instruments which in fact can be used in a safe, sanitary and effective manner so as, without injury, to prevent conception and avert the consequences and results thereof, as specified in Paragraph 4 hereof.

7. Medically speaking, the use of such articles, drugs and instruments is indicated as the best and safest preventive measure necessary for the protection and preservation of the health of the plaintiffs.

8. The plaintiffs have been unable to obtain the information and advice referred to in Paragraph 6 for the sole reason that the delivery and use of such information and advice may or will be claimed by the defendant State's Attorney to constitute offenses against the Statutes and common law of this State, and especially by the provisions of Section 8568 and Section 8875 of the General Statutes of Connecticut, Revision of 1949.

9. The defendant State's Attorney, in the course of his public duty, intends to prosecute any offense against said statutes and common law, and claims that the giving of information and advice and the procurement and delivery of drugs, articles and instruments and the use thereof, as stated in Paragraph 6 herein would constitute offenses forbidden by the criminal statutes and common law of this State, and especially by the provisions of Section 8568 and Section 8875 of the General Statutes of Connecticut, Revision of 1949.

[fol. 4] 10. The plaintiffs claim, on the contrary, that such acts proposed by them to be done do not violate any valid Statutes or any valid rule of the common law of this State; but as citizens and residents of this State, they are ignorant as to their rights, privileges, powers and immunities on the one hand, as concerns relations with this State, and on the other hand as concerns their relations with said physician.

11. If this Court shall determine and declare prescription and advice by said physician for the use of such articles, drugs and instruments and the use thereof under the circumstances of this case not to be forbidden by the crim-

inal statutes and common law of this State, and especially by the provisions of Section 8568 and Section 8875 of the General Statutes of Connecticut, Revision of 1949 because they are in conflict with the Constitution of the United States and especially Amendment XIV thereof, the plaintiffs will be able to obtain from said physician such prescription and advice and to procure said drugs, articles and instruments and instructions as to how to use the same in a safe, sanitary and effective manner so as to avoid the dangerous condition specified in Paragraph 4.

12. If, however, this Court should find and determine that the proposed prescription, advice, procurement, delivery, and treatment and instruction and use, above referred to would constitute an offense forbidden by said Statutes and the common law, and that they are not in conflict with the Constitution of the United States, and if plaintiffs should be convicted of the commission of offenses against such Statutes, the plaintiffs would be subject to a fine or imprisonment or both.

13. Unless the remedy herein prayed for be granted, the plaintiffs will suffer irreparable injury.

14. The plaintiffs have an interest, legal or equitable, by reason of danger of loss of liberty and/or property or of uncertainty as to their rights and other jural relations.

15. There is an actual bona fide and substantial question or issue in dispute, and substantial uncertainty of legal relations which require settlement between the parties.

[fol. 5] 16. All persons having an interest in the subject matter of the complaint are parties to this action.

The plaintiffs claim a declaratory judgment which shall declare:

1. Whether or not sections 8568 and 8875 of the General Statutes of Connecticut Revision of 1949 are in conflict with the Constitution of the United States and especially of Amendment XIV thereof as depriving plaintiffs of life and liberty without due process of law.

2. Whether or not said Statutes constitute a valid exercise of the police power of the State as applied to the facts stated in this complaint.

I hereby certify that I have personal knowledge of the financial responsibility of the plaintiffs and deem it sufficient to pay the costs of this action.

Of this writ with your doings thereon, due service and return make.

Dated at New Haven this twenty-second day of May, 1958.

Catherine G. Roraback, Commissioner of the Superior Court.

[fol. 6]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

STATE OF CONNECTICUT

JANE DOE,

vs.

ABRAHAM S. ULLMAN, State's Attorney.

COMPLAINT—Filed May 22, 1958

To the Sheriff of the County of New Haven, or His Deputy—

Greetings:

By authority of the State of Connecticut you are hereby commanded to summon Abraham S. Ullman of the Town of Hamden, County of New Haven and State of Connecticut, as he is State's Attorney in and for the County of New Haven, to appear before the Superior Court to be held at [fol. 7] New Haven, within and for the County of New Haven, on the first Tuesday of June, 1958, then and there to answer unto Jane Doe, of the Town of New Haven, in

said County and State, in a civil action wherein the plaintiff complains and says:

1. The plaintiff is a housewife who resides and has continuously resided in the Town of New Haven with her husband since their marriage in 1954. Plaintiff is 25 years old. She and her husband have no living children.

2. Dr. C. Lee Buxton, hereinafter referred to as said physician, is and has been a Board-certified Specialist in Obstetrics and Gynecology since the year 1940. At present he is Professor and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and of the Obstetrical Service of the Grace-New Haven Community Hospital. In his latter capacity he is responsible for diagnosis and treatment of all patients admitted to that Service and was so in charge when the plaintiff was admitted as stated in Paragraph 3 hereof.

3. The plaintiff was admitted to the Obstetrical Service of the Grace-New Haven Community Hospital through the Emergency Room on January 25, 1957, with a diagnosis of hypertensive cardiovascular disease, three and one-half month intrauterine pregnancy, toxemia of pregnancy, and Cushing's syndrome; blood pressure 280/140. Because of the severe hypertensive toxemia, it was decided that sound medical practice called for termination of the pregnancy. However, on January 28, 1957, before this procedure could be carried out, plaintiff developed a cerebral hemorrhage, which produced a right hemiplegia and total aphasia. After two weeks of complete unconsciousness and a total of nine weeks of acute illness, during which time it was necessary to carry out several life-saving procedures, including a tracheotomy and continuous intravenous therapy with hypotensive drugs, the patient was then transferred to Gaylord Sanitarium. She returned to the Grace-New Haven Community Hospital on June 19, 1957, at which time she spontaneously delivered an 1125 gm. stillborn fetus estimated to be 7 and ½ to 8 months developed. At present the plaintiff has hypertensive cardiovascular disease, severe paresis of the right leg, total paralysis of the right arm, residual [fol. 8] kidney damage, marked impairment of speech, and emotional instability.

The existence of such condition as described in Paragraph 3 hereof renders the possibility of another pregnancy exceedingly perilous to the life of the plaintiff, in that such a pregnancy would induce in the plaintiff an abnormal condition known as hypertensive toxemia of pregnancy, and if such condition should occur with the severity anticipated in this individual, who has already suffered extensive renal damage it would almost inevitably result in the death of the plaintiff.

5. The plaintiff needs and requires, and has asked said physician for medical advice as to what preventive measures can be taken to avert the occurrence of the dangerous condition described in Paragraph 4 hereof.

6. The plaintiff has knowledge of the fact that it is the opinion of said physician that the best and safest medical treatment which could be prescribed for the plaintiff would be to inform her as to methods of preventing conception. Said physician has knowledge of drugs, medicinal articles and instruments which in fact could be used by the plaintiff in a safe, sanitary and effective manner so as, without injury to the plaintiff, to prevent conception and avert the consequences and results thereof, as described in Paragraph 4 hereof.

7. Medically speaking, the use of such articles, drugs, and instruments is indicated as the best and safest preventive measure necessary for the protection and preservation of the life and health of the plaintiff.

8. The plaintiff has been unable to obtain the information and advice referred to in Paragraph 6 for the sole reason that the delivery and use of such information and advice may or will be claimed by the defendant State's Attorney to constitute offenses against the Statutes and common law of this State, and especially by the provisions of Section 8568 and Section 8875 of the General Statutes of Connecticut, Revision of 1949.

9. The defendant State's Attorney, in the course of his public duty, intends to prosecute any offense against said Statutes and common law, and claims that the giving of information and advice and the procurement and delivery

of drugs, articles and instruments and the use thereof, as stated in Paragraph 6 herein, would constitute offenses for- [fol. 9] bidden by the criminal statutes and common law of this State, and especially by the provisions of Section 8568 and Section 8875 of the General Statutes of Connecticut, Revision of 1949.

10. The plaintiff claims, on the contrary, that such acts proposed by her to be done do not violate any valid Statutes or any valid rule of the common law of this State; but she, as a citizen and resident of this State, is ignorant as to her rights, privileges, powers and immunities on the one hand, as concerns her relations with this State, and on the other hand as concerns her relations with said physician.

11. If this Court shall determine and declare prescription and advice by said physician for the use of such articles, drugs and instruments for the treatment of the plaintiff under the circumstances of this case not to be forbidden by the criminal statutes and common law of this State, and especially by the provisions of Section 8568 and Section 8875 of the General Statutes of Connecticut, Revision of 1949 because they are in conflict with the Constitution of the United States and especially Amendment XIV thereof, plaintiff will be able to obtain from said physician such prescription and advice, and to procure said drugs, articles and instruments and instructions as to how to use the same in a safe, sanitary and effective manner so as to avoid the dangerous condition specified in Paragraph 4.

12. If, however, this Court should find and determine that the proposed prescription, advice, procurement, delivery, treatment, instruction, and use above referred to would constitute an offense forbidden by said statutes and the common law, and that they are not in conflict with the Constitution of the United States, and if plaintiff should be convicted of the commission of offenses against such statutes, the plaintiff would be subject to a fine or imprisonment, or both.

13. Unless the remedy herein prayed for be granted, the plaintiff, as a woman with the aforesaid bodily condition, will suffer irreparable injury.

14. The plaintiff has an interest, legal or equitable, by reason of danger of loss of liberty and/or property or of uncertainty as to her rights and other jural relations.

[fol. 10] 15. There is an actual bona fide and substantial question or issue in dispute, and substantial uncertainty of legal relations which require settlement between the parties.

16. All persons having an interest in the subject matter of the complaint are parties to this action.

The plaintiff claims a declaratory judgment which shall declare:

1. Whether or not Sections 8568 and 8875 of the Connecticut Revised Statutes of 1949 are in conflict with the Constitution of the United States and especially of Amendment XIV thereof as depriving plaintiff of life and liberty without due process of law.

2. Whether or not said Statutes constitute a valid exercise of the police power of the State as applied to the facts stated in this complaint.

I hereby certify that I have personal knowledge of the financial responsibility of the plaintiff and deem it sufficient to pay the costs of this action.

Of this writ with your doings thereon, due service and return make.

Dated at New Haven this twenty-second day of May, 1958.

Catherine G. Roraback, Commissioner of the Superior Court.

[fol. 12]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

STATE OF CONNECTICUT

C. LEE BUXTON,

vs.

ABRAHAM S. ULLMAN, State's Attorney.

COMPLAINT—Filed May 8, 1958

[Writ and complaint as amended by Stipulation filed February 14, 1959.]

To the Sheriff of the County of New Haven, or His Deputy—

Greetings:

By authority of the State of Connecticut you are hereby commanded to summon Abraham S. Ullman of the Town of Hamden, County of New Haven, and State of Connecticut, as he is the State's Attorney in and for the County of New Haven, to appear before the Superior Court to be [fol. 13] held at New Haven, within and for the County of New Haven, on the first Tuesday of June, 1958, then and there to answer unto C. Lee Buxton, of the Town of Woodbridge, in said County and State, in a civil action wherein the plaintiff complains and says:

1. The plaintiff is a registered licensed physician. He is a graduate of the Columbia University College of Physicians and Surgeons, from which he received the degree of Doctor of Medicine in the year 1932, and the degree of Med. S.D. in 1940. He has had postgraduate training in Obstetrics and Gynecology and Surgery at the Mary Imogene Bassett Hospital in Cooperstown, New York and at the Sloane Hospital for Women of the Columbia-Presbyterian Medical Center in New York City, and since the year 1940 has been a Board-certified specialist in Obstetrics and Gyne-

cology. He was formerly Professor of Obstetrics and Gynecology at the Columbia-Presbyterian Medical Center in New York City, and at present is a Professor and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and the Grace-New Haven Community Hospital.

2. The plaintiff is responsible for the diagnosis and treatment of all patients admitted to the Obstetrical Service of the Grace-New Haven Community Hospital and was in charge of that service, when the patient described in paragraph 3 herein was admitted to said service for diagnosis and treatment as described in paragraph 4 hereof.

3. Jane Doe, hereafter referred to as said patient, is 25 years old, a married woman and housewife who resides and has continually resided in the Town of New Haven with her husband since their marriage in 1954. She and her husband have no living children.

4. Said patient was admitted to the Obstetrical Service of the Grace-New Haven Community Hospital through the Emergency Room on January 25, 1957, with the diagnosis of hypertensive cardiovascular disease, three and one-half month intra-uterine pregnancy, toxemia of pregnancy, and Cushing's syndrome; blood pressure 280/140. Because of the increasing hypertension, it was decided that sound medical practice called for termination of the pregnancy. However, on January 28, 1957, before this procedure could be [fol. 14] carried out, said patient developed a massive cerebral hemorrhage, which produced a right hemiplegia and total aphasia. The patient was transferred to Gaylord Sanitarium, and returned to the Grace-New Haven Community Hospital on June 19, 1957, at which time she spontaneously delivered an 1125 gm. stillborn fetus estimated to be 7 and ½ to 8 months developed. At present said patient has hypertensive cardiovascular disease, severe paresis of the right leg, total paralysis of the right arm, residual kidney damage, marked impairment of speech, and emotional instability.

5. The existence of such condition as described in Paragraph 4 hereof renders the possibility of conception and

further pregnancy exceedingly perilous to the life of said patient, in that such a pregnancy has a decided tendency to induce in such a person an abnormal condition, known as hypertensive toxemia of pregnancy, and if such condition should occur in her case it would probably result in her death.

6. Said patient needs and requires, and has asked the plaintiff for medical advice as to what preventive measures can be taken to avert the occurrence of the dangerous condition described in Paragraph 5 hereof.

7. It is the opinion of the plaintiff that the best and safest medical treatment which could be prescribed for said patient would be to inform her as to methods of preventing conception. Plaintiff has knowledge of drugs, medicinal articles and instruments which in fact could be used by said patient in a safe, sanitary and effective manner so as, without injury to the patient, to prevent the conception, and avert the consequences and results thereof, as described in Paragraph 5 hereof.

8. Medically speaking, the use of such articles, drugs and instruments is indicated as the best and safest preventive measure necessary for the protection and preservation of the life and health of said patient.

9. The defendant State's Attorney, in the course of his public duty, intends to prosecute any offense against the Statutes and common law of the State, and claims that the giving of information and advice and the procurement and [fol. 15] delivery of drugs, articles and instruments and the use thereof, as stated in Paragraph 7, would constitute offenses forbidden by the criminal statutes and common law of this State, and especially by the provisions of Section 8568 and Section 8875 of the General Statutes of Connecticut, Revision of 1949.

10. The plaintiff claims, on the contrary, that such acts proposed by him to be done do not violate any valid Statute nor any valid rule of the common law of this State, but, rather, constitute appropriate, effective and necessary measures which he is obligated to take under his right and duty to practice his profession in the medically approved fashion

in a matter involving the very life of his patient. However, the plaintiff, as a physician and a citizen and resident of this State, is ignorant as to his rights, privileges, powers and immunities, and his duties and obligations, on the one hand, as concern his relations with this State, and on the other hand as concern his relations with said patient.

11. If this Court shall determine and declare the prescription and advice by plaintiff for the use of such articles, drugs and instruments for the treatment of said patient under the circumstances of this case not to be forbidden by the criminal statutes and common law of this State, and especially by the provisions of Section 8568 and Section 8875 of the General Statutes of Connecticut, Revision of 1949, because such statutes are in conflict with the Constitution of the United States and especially of the Amendment XIV thereof, plaintiff in the course of his professional work and duties will make such prescription and give such advice and will cause to be procured and delivered to said patient such drugs, articles and instruments, and will as a physician instruct, or cause her to be instructed, how to use the same in a safe, sanitary and effective manner.

If however, this Court should find and determine that the proposed prescription, advice, procurement, delivery, treatment and instruction described above would constitute an offense forbidden by said Statutes and the common law, and that such Statutes are not in conflict with the Constitution of the United States, and if the plaintiff should be convicted of the commission of offenses against said Stat- [fol. 16] utes, the plaintiff believes he might be liable under the provisions of Section 4358 of the General Statutes of Connecticut, Revision of 1949, to suspension, revocation or annulment of his license to practice medicine, and the consequent loss of his means of livelihood in addition to fine or imprisonment or both.

12. Unless the remedy herein prayed for be granted, the plaintiff, as a physician pursuing his professional interest and obligation will suffer irreparable injury.

13. The plaintiff has an interest, legal or equitable, by reason of danger of loss of liberty and/or property or of uncertainty as to his rights and other jural relations.

14. There is an actual bona fide and substantial question or issue in dispute, and substantial uncertainty of legal relations which require settlement between the parties.

15. All persons having an interest in the subject matter of the complaint are parties to this action.

The plaintiff claims a declaratory judgment which shall declare:

1. Whether or not sections 8568 and 8875 of the General Statutes of Connecticut Revision of 1949 are in conflict with the Constitution of the United States and especially of Amendment 14 thereof as depriving plaintiff of property and liberty without due process of law.

2. Whether or not said Statutes constitute a valid exercise of the police power of the state as applied to the facts stated in this complaint.

I hereby certify that I have personal knowledge of the financial responsibility of the plaintiff and deem it sufficient to pay the costs of this action.

Of this writ with your doings thereon, due service and return make.

Dated at New Haven this twenty-second day of May, 1958.

Catherine G. Roraback, Commissioner of the Superior Court.

[fol. 17]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

DEMURRER—Filed November 7, 1958

(Clerk's Note—Similar demurrers were filed in all three cases.)

The defendant demurs to the complaint in the above-entitled action on the following grounds:

1. The plaintiff is seeking an interpretation of statutes which have previously been conclusively determined by the Supreme Court of Errors.

2. The plaintiff in the present action is seeking to determine by declaratory judgment certain alleged rights and jural relations under Sections 8568 and 8875, which rights and jural relations have been conclusively determined by our Courts in previous decisions.

3. The passage of time and a change in Court personnel cannot be grounds for seeking a review of statutes which have previously been construed and determined by our Courts.

4. The complaint does not conform to the necessary requirements of the rules of Court for declaratory judgments because:

(a) There is no uncertainty as to the rights or jural relations of the plaintiff.

(b) The plaintiff does not set forth any actual bona fide and substantial questions or issues in dispute or substantial uncertainty of legal relations which require further settlement by this Court, since said issues have been previously determined.

(c) All parties having an interest in the subject matter of the complaint are not parties to this action.

5. The above action is brought against Abraham S. Ullman, acting in his official capacity as State's Attorney, and as such is not maintainable since the action is in effect against the State and the plaintiff does not allege any statute indicating that the State has authorized or consented to the bringing of said action.

Defendant,
by John J. Bracken, Attorney General; Raymond J. Cannon, Assistant Attorney General, His Attorneys.

[fol. 18]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

MEMORANDUM OF DECISION ON DEMURRERS IN ALL THREE CASES—January 5, 1959

These five actions were instituted to determine by declaratory judgments the constitutionality of two sections of the General Statutes of the State of Connecticut as to the plaintiffs who brought these actions.

The Statutes are as follows:

Section 8568. "Use of Drugs or Instruments to prevent Conception. Any person who shall use any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 8875. Accessories. Any person who shall assist, abet, counsel, cause, hire or command another to commit [fol. 19] any offense may be prosecuted and punished as if he were the principal offender.

To each of these actions the defendant has interposed a demurrer on each of the following grounds:

1. This is a request for a declaratory judgment on an issue which has previously been determined by our Supreme Court of Errors.

2. Passage of time and change in court personnel.

A study of the issues shows us that the basic issue has been before our Supreme Court on at least two former occasions.

State v. *Nelson*, 126 Conn. 412, viewed the following facts under the following circumstances. This was a criminal prosecution. The accused were the Doctor, the patient and the attending nurse. The charge violation of these identical statutes then bearing captions Sections 6246 and 6562, G.S. 1930. The accused demurred on the ground that Section 6246 (8568) constitutes an interference with the individual liberty of citizens and a deprivation thereof without due process of law violative of the federal and state constitu-

tions, and, specifically, because it applies where a married woman makes use of such drugs, articles or instruments, for the purpose of preventing conception:

a. Upon the recommendation and advice of a physician.

b. Under circumstances in which all physicians would agree would jeopardize her life.

c. Where, for health reasons, the use thereof is necessary for such purpose.

d. Where such contraceptives are necessary to protect and procure the best possible state of health and well being.

The trial court sustained the demurrer and found the accused not guilty. The state, with the permission of the trial court, appealed.

The Supreme Court found error and ordered the demurrers overruled.

Tileston v. *Ullman*, 129 Conn. 84, is an action where as here a declaratory judgment was sought as to whether the statutes prohibit a licensed physician from prescribing the use of contraceptives for married women in cases where pregnancy would endanger life or health, and if so whether such statutes are constitutional.

[fol. 20] The court held:

1. The reasoning of the opinion in the *Nelson* case *supra* control the instant case and reject the claims now made by the plaintiffs.

2. That decision became the law of the state.

3. Change in personnel (of the Supreme Court) affords no ground for reopening a question which has been authoritatively settled.

4. The history of this type of legislation from its first mention in our statutes in 1879 to date show repeated and recent refusal of the legislature to accept and except exceptions as are here suggested.

5. For the courts to construe these plainly worded statutes as unapplicable to physicians, even under the limited circumstances of this case, would be to write into that statute what is not there and what the legislature has therefore refused to place there.

As to constitutionality of such statutes we again turn to *Tileston* v. *Ullman*, *supra*, at page 90 where reference is made to *Commonwealth* v. *Gardner*, 300 Mass. 372, "The terms of the statute are plain, unequivocal and peremptory, and contain no exceptions, that the statute (Mass.) was originally enacted in 1879 and that under the police power the legislature, without any denial of rights under the state or federal constitution."

For the above reasons the demurrers are sustained.

Healey, J.

[fol. 21]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

MOTION FOR JUDGMENT AFTER DEMURRER SUSTAINED—Filed January 21, 1959

(Clerk's Note—Similar motions were filed in all three cases.)

The defendant in the above-entitled action represents that a demurrer to plaintiffs' complaint was sustained by the Court on January 5, 1959, and more than fifteen days have elapsed since that date and the plaintiffs have informed the defendant that they do not intend to plead over.

Wherefore, the defendant moves that judgment be entered for the defendant because of the failure of the plaintiffs to plead further after demurrer sustained.

Defendant,

By Albert L. Coles, Attorney General; Raymond J. Cannon, Assistant Attorney General, Its Attorneys.

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

ORDER ENTERING JUDGMENT—January 30, 1959

(Clerk's Note—Similar orders were entered in all three cases.)

The Court having heard the above motion, it is hereby

Ordered that judgment be and is hereby entered for the defendant on demurrer sustained.

By the Court (Thim, J.), Edward Horwitz, Clerk.

[fol. 22]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

No. 87985

PAUL POE and PAULINE POE, of the Town and County of New Haven, State of Connecticut,

vs.

ABRAHAM S. ULLMAN, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven.

Present: Hon. John R. Thim, Judge.

JUDGMENT—January 30, 1959

This action by writ and complaint dated May 22nd, 1958, claiming a declaratory judgment declaring:

1. Whether or not Sections 8568 and 8875 of the Connecticut Revised Statutes of 1949 are in conflict with the Constitution of the United States and especially of Amendment XIV thereof as depriving plaintiffs of life and liberty without due process of law;

2. Whether or not said Statutes constitute a valid exercise of the police power of the State as applied to the facts stated in said complaint; came to this Court on the first Tuesday of June, 1958, and thence to January 5th, 1959,

when the parties appeared and were heard by the Court (Healey, J.) on the defendant's demurrer to said complaint, as on file, and when the Court sustained said demurrer.

Said action came thence to the present time when, the plaintiffs having failed and neglected to plead further, the parties appeared and were heard by the Court on the defendant's motion for judgment.

The Court, having heard the parties, finds that said motion should be and the same hereby is granted.

Whereupon it is adjudged and declared as a declaratory judgment of the rights of the parties that said Sections 8568 and 8875 are constitutional and constitute a valid exercise of the police power of the State as applied to the facts stated in said complaint, and it is further adjudged that the defendant recover of the plaintiffs his costs taxed at $

By the Court,

Edward Horwitz, Clerk.

[fol. 23]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

No. 7987

JANE DOE, of the Town and County of New Haven, State of Connecticut,

vs.

ABRAHAM S. ULLMAN, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven.

Present: Hon. John R. Thim, Judge.

JUDGMENT—January 30, 1959

This action by writ and complaint dated May 22nd, 1958, claiming a declaratory judgment declaring:

1. Whether or not Sections 8568 and 8875 of the Connecticut Revised Statutes of 1949 are in conflict with the

Constitution of the United States and especially of Amendment XIV thereof as depriving plaintiff of life and liberty without due process of law;

2. Whether or not said Statutes constitute a valid exercise of the police power of the State as applied to the facts stated in said complaint; came to this Court on the first Tuesday of June, 1958; and thence to January 5th, 1959, when the parties appeared and were heard by the Court (Healey, J.) on the defendant's demurrer to said complaint, as on file, and when the Court sustained said demurrer.

Said action came thence to the present time when, the plaintiff having failed and neglected to plead further, the parties appeared and were heard by the Court on the defendant's motion for judgment.

The Court, having heard the parties, finds that said motion should be and the same hereby is granted.

Whereupon it is adjudged and declared as a declaratory judgment of the rights of the parties that said Sections 8568 and 8875 are constitutional and constitute a valid exercise of the police power of the State as applied to the facts stated in said complaint, and it is further adjudged that the defendant recover of the plaintiffs his costs taxed at $

By the Court,

Edward Horwitz, Clerk.

[fol. 24]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

No. 87983

C. LEE BUXTON, of the Town of Woodbridge, County of New Haven, State of Connecticut,

vs.

ABRAHAM S. ULLMAN, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven.

Present: Hon. John R. Thim, Judge.

JUDGMENT—January 30, 1959

This action by writ and complaint dated May 22nd, 1958, claiming a declaratory judgment declaring:

1. Whether or not Sections 8568 and 8875 of the General Statutes of Connecticut Revision of 1949 are in conflict with the Constitution of the United States and especially of Amendment 14 thereof as depriving plaintiff of property and liberty without due process of law;

2. Whether or not said Statutes constitute a valid exercise of the police power of the state as applied to the facts stated in said complaint; came to this Court on the first Tuesday of June, 1958, and thence to January 5th, 1959, when the parties appeared and were heard by the Court (Healey, J.) on the defendant's demurrer to said complaint, as on file, and when the Court sustained said demurrer.

Said action came thence to the present time when, the plaintiff having failed and neglected to plead further, the parties appeared and were heard by the Court on the defendant's motion for judgment.

The Court, having heard the parties, finds that said motion should be and the same hereby is granted.

Whereupon it is adjudged and declared as a declaratory judgment of the rights of the parties that said Sections 8568 and 8875 are constitutional and constitute a valid exercise of the police power of the State as applied to the facts stated in said complaint, and it is further adjudged that the defendant recover of the plaintiffs his costs taxed at $

By the Court,
Edward Horwitz, Clerk.

[fol. 25]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

PLAINTIFFS' APPEAL—Filed February 11, 1959

(Clerk's Note—Similar appeals have been filed in all three cases.)

In the above entitled action the plaintiffs appeal to the Supreme Court of Errors from the judgment rendered therein.

The Plaintiffs,
By Catherine G. Roraback, Their Attorney.

[fol. 26]

IN THE SUPERIOR COURT OF NEW HAVEN COUNTY

ASSIGNMENT OF ERRORS—Filed February 11, 1959

(Clerk's Note—Similar Assignments of Error were filed in all three cases.)

The Court erred:

1. In sustaining the defendant's demurrer to the complaint.

2. In holding and ruling that the issues in this case have been conclusively determined by prior decisions of the Supreme Court of Errors.

3. In holding and ruling that the factual situation in this case is identical to that in the cases of *State* v. *Nelson*, 126 Conn. 412; and *Tileston* v. *Ullman*, 129 Conn. 84.

4. In holding and ruling that the plaintiffs in this case are in the same position as the defendants in the *Nelson* case, and the plaintiffs in the *Tileston* case, *supra*, and that their rights have been conclusively determined by these cases.

5. In holding and ruling that Sections 8568 and 8875 of the General Statutes of Connecticut, Revision of 1949, can be applied to these plaintiffs without unlawfully infringing on their rights to life, liberty and property as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

6. In holding and ruling that Sections 8568 and 8875 of the General Statutes of Connecticut, Revision of 1949, con- [fol. 27] stitute a valid exercise of the police power of the State as applied to the facts stated in this complaint.

7. In holding and ruling that Sections 8568 and 8875 of the General Statutes of Connecticut, Revision of 1949, are not in conflict with the Constitution of the United States, and especially of the Fourteenth Amendment thereto.

8. In holding and ruling that Sections 8568 and 8875 of the General Statutes of Connecticut, Revision of 1949, constitute a valid exercise of the police power of the State.

The Plaintiffs,
By Catherine G. Roraback, Their Attorney.

[fol. 28]

IN SUPREME COURT OF ERRORS OF CONNECTICUT

October Term, 1959

C. LEE BUXTON,

v.

ABRAHAM S. ULLMAN, State's Attorney.

PAUL POE et al.,

v.

ABRAHAM S. ULLMAN, State's Attorney.

HAROLD HOE et al.,

v.

ABRAHAM S. ULLMAN, State's Attorney.

JANE DOE,

v.

ABRAHAM S. ULLMAN, State's Attorney.

OPINION—December 8, 1959

Actions for declaratory judgments determining the constitutionality of legislation forbidding the use and prescription of contraceptive devices, brought to the Superior Court in New Haven County, where demurrers to the complaints were sustained, *Healey, J.*, and, the plaintiffs failing to plead further, judgments were rendered in favor of the defendant, from which the plaintiffs appealed. *No error.*

Catherine G. Roraback, for the appellants (plaintiffs).

Raymond J. Cannon, assistant attorney general, with whom, on the brief, was *Albert L. Coles*, attorney general, for the appellee (defendant) in each case.

BALDWIN, C. J. The complaints in these four actions seek declaratory judgments as to the constitutionality of § 53-32 of the General Statutes, prohibiting the use of any drug, medicinal article or instrument for the purpose of preventing conception, and § 54-196, prohibiting the counseling or abetting of such use.[1] The plaintiff C. Lee Buxton is a licensed physician. The plaintiff Jane Doe is a married woman living with her husband. The plaintiffs Paul and Pauline Poe, as well as the plaintiffs Harold and Hanna Hoe, are husband and wife. Except for Dr. Buxton, all the plaintiffs are using, for the purpose of this litigation, fictitious names. They are patients of Dr. Buxton. The plaintiffs claim that the two statutes deprive them of rights guaranteed by the fourteenth amendment to the federal constitution. The defendant demurred to all the complaints; among his grounds were that the plaintiffs were seeking declaratory judgments on legal issues already conclusively determined by this court and that the passage of time and a change in the personnel of the court would not justify a reversal of those determinations. The trial court sustained the demurrers on these grounds, and the plaintiffs have appealed.

A demurrer to a complaint for a declaratory judgment is proper when the facts alleged do not bring the case within the scope of the statute and rules relating to declaratory judgments. General Statutes § 52-29; Practice Book § 277; *Hill* v. *Wright*, 128 Conn. 12, 15, 20 A.2d 388; Maltbie, Conn. App. Proc. § 227; see *Glens Falls Ins. Co.* v. *Somers*, 146 Conn. 708, 713, A.2d . If the rights and jural relations of parties in the situation of these plaintiffs have been conclusively determined by previous decision of this court, the demurrers were properly sustained upon the grounds stated.

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[1] "Sec. 53-32. USE OF DRUGS OR INSTRUMENTS TO PREVENT CONCEPTION. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

"Sec. 54-196. ACCESSORIES. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Twice in the recent past this court has passed upon questions of interpretation and constitutionality of what are presently §§ 53-32 and 54-196. *State* v. *Nelson*, 126 Conn. 412, 11 A.2d 856, decided March 6, 1940, held that there was no ambiguity in the wording of the statutes which made the legislative intent uncertain so as to permit a construction which allowed an exception in favor of a duly licensed physician who prescribes the use of contraceptive measures to a patient who is a married woman when, in his professional opinion, her general health and well-being necessitate it. We said (p. 417): "Any intention on the part of the Legislature to allow [the exception claimed] is negatived not only by the absolute language used originally and preserved ever since but also, signally, by [the legislature's] repeated and recent refusals to inject an exception." We held, also (p. 422), that the statute was a valid exercise of the police power. We pointed out (p. 418) that the particular facts alleged in the information confined the issues to situations where, in the opinion of the physician, "'the general health' of a married woman requires the use [fol. 29] of contraceptives." We said that there was, therefore, "no occasion to determine whether an implied exception might be recognized when 'pregnancy would jeopardize life' . . . similar to that usually expressly made in statutes concerning abortion." See General Statutes § 53-29.

In *Tileston* v. *Ullman*, 129 Conn. 84, 26 A.2d 582, decided May 22, 1942, the plaintiff, a licensed physician, brought an action for a declaratory judgment to determine whether the statutes forbade him from prescribing the use of contraceptives for a married woman in cases where a pregnancy would endanger her life or health and, if the statutes did, whether they were constitutional. This presented the issue which we specifically said was not before us in the *Nelson* case. We held in the *Tileston* case that, in the light of the legislative history of the statutes and the repeated and recent refusals of the legislature to inject any exception, the statutes could not be construed to allow the exception claimed, and that they were constitutional.

It is claimed that the facts in the cases at bar present an entirely different situation with respect to the rights of the plaintiffs from that presented in the *Nelson* and *Tileston*

cases. In Buxton v. Ullman, the complaint alleges, in substance, and the demurrer admits, that the plaintiff, a licensed physician, has a patient, Jane Doe, a married woman twenty-five years of age, living with her husband. She had been admitted to the obstetrical service of the hospital where the plaintiff, an eminently qualified obstetrician and gynecologist, was in charge. She was three and one-half months pregnant and developed a condition which brought her to the very brink of death. Her physical condition is now such that conception and another pregnancy would be exceedingly dangerous to her life. She needs and requires advice as to what preventive measures can be taken to avert a recurrence of the experience she suffered. She claims a right to live a normal married life with her husband. She has asked the plaintiff for medical advice, and he has knowledge of drugs, medicinal articles and instruments which could be used by her to prevent conception and avoid the serious consequences of another pregnancy. In a companion case, Doe v. Ullman, the plaintiff is the patient described in the Buxton case, and she alleges, in substance, the same facts as are alleged in the Buxton complaint. In another companion case the complaint alleges, in substance, that the plaintiffs, Paul and Pauline Poe, are a married couple who have consulted Dr. Buxton. Mrs. Poe, who is twenty-six years old and living with her husband, has borne three abnormal children, no one of whom lived more than ten weeks. The basic cause of these abnormalities is thought by Dr. Buxton and other qualified medical specialists to be genetic, but the prognosis is very uncertain and renders the prospect of another pregnancy extremely disturbing to both Mr. and Mrs. Poe. In still another case the plaintiffs, Harold and Hanna Hoe, aged twenty-nine and twenty-six years, respectively, husband and wife, have no living children. Mrs. Hoe has been delivered of four children. Owing to the blood groupings of these plaintiffs, Mrs. Hoe's blood being Rh negative and Mr. Hoe's Rh positive, the prospects that they can procreate a normal child is highly unlikely.

The plaintiff Buxton has knowledge of drugs, medicinal articles and instrumentalities which could be safely used to prevent conception and avert the dire consequences which

have followed conception and pregnancy in the women plaintiffs, who desire to live normal married lives with their husbands. If the plaintiff Buxton, on one hand, applies this knowledge by advising these married people as to available contraceptive measures, and if, on the other hand, these married people accept and follow his advice, the statutes would be violated by all the plaintiffs. It is conceded by the demurrers that the use of contraceptives is, according to medical science, the best and safest preventive measure for the plaintiffs to follow in order to avoid pregnancy.

The plaintiffs claim that these facts raise issues not raised in the *Nelson* and *Tileston* cases. The plaintiff Buxton asserts that he has a constitutional right, distinct from that of his patients, to practice his profession free from unreasonable restraint and to advise and prescribe the use of drugs, medicinal articles and instrumentalities which he believes it to be his professional obligation to prescribe. The facts in the Buxton case differ from those in the *Tileston* case in that here the plaintiff, a physician, is asserting an alleged constitutional right of his own rather than an alleged constitutional right of a patient. Essentially, there is no real difference in the nature of the right. The effect of regulation of a business or profession is to curtail the activities of both the dispenser and the user of goods or services. Both are deprived of some advantage which they might otherwise have. The Doe, Poe and Hoe cases differ from the *Nelson* and *Tileston* cases in that the plaintiffs here are asserting their rights, as patients, to the benefit of a physician's prescription for the use of contraceptives which would relieve them of a dangerous threat to their health and happiness. Their right, too, is essentially [fol. 30] the same as that of the physician. In other words, the difference between the *Tileston* and *Nelson* cases and those at bar lies only in the fact that here each plaintiff is asserting his own constitutional right, while in the *Nelson* and *Tileston* cases the doctors were attempting to assert the right of their patients to receive treatment.

It cannot be questioned that the "state may regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the

public health, as well as to promote . . . the common good.'" *State* v. *Vachon*, 140 Conn. 478, 481, 101 A.2d 509, quoting from *House* v. *Mayes*, 219 U.S. 270, 282, 31 S. Ct. 234, 55 L. Ed. 213. The exercise of this power is always "subject, in the courts, to the test whether it serves the public health, safety and morals at all and whether it does so in a reasonable manner." *Amsel* v. *Brooks*, 141 Conn. 288, 294, 106 A.2d 152. In our tripartite system of government, the judiciary accords to the legislature the right to determine in the first instance what is the nature and extent of the danger to the public health, safety, morals and welfare and what are the measures best calculated to meet the threat. Courts interfere with legislation enacted under the police power only when it clearly appears that the legislative measures taken do not serve the public health, safety, morals or welfare or that they deny or interfere with private rights unreasonably. *Clark* v. *Town Council*, 145 Conn. 476, 482, 144 A.2d 327; *State* v. *Gordon*, 143 Conn. 698, 703, 125 A.2d 477; *Cyphers* v. *Allyn*, 142 Conn. 699, 705, 118 A.2d 318. It was out of respect for these fundamental principles that this court in the *Nelson* and *Tileston* cases refused to so interpret the statutes as to allow an exception to cover situations of the kind presented in the cases at bar and upheld the constitutionality of the statutes.

If the plaintiffs are correct in their claims, we would be required to follow one of two courses: overrule the *Nelson* and *Tileston* decisions by construing the statutes to include the exception proposed in those cases and thus permit physicians to prescribe, and patients to use, contraceptive measures under circumstances similar to those present in the cases at bar, and by that means sustain the constitutionality of the statutes; or hold that the statutes without the claimed exception are unconstitutional. Since the *Tileston* decision in 1942, the General Assembly has consistently refused to amend the statutes so as to allow physicians to prescribe the use of contraceptive measures.[2] Furthermore, two com-

[2] 1943 Sess. H.B. 313. AN ACT TO ESTABLISH STANDARDS FOR CONTRACEPTIVE DEVICES AND THEIR DISTRIBUTION (blank bill). Referred to committee. H. Jour. p. 194. S. Jour. p. 209; committee recommended rejection and passage of substitute. H. Jour. p. 1299;

plete revisions of the general statutes have been approved by the General Assembly and the statutes in question have been left unchanged. Rev. 1949, §§ 8568, 8875; Rev. 1958, Vol. 31, §§ 53-32, 54-196. The legislature is presumed to be aware of the interpretation placed upon its legislation by the courts and the effect which its own nonaction thereafter may have. *Herald Publishing Co. v. Bill*, 142 Conn. 53, 63, 111 A.2d 4; *Hurlbutt v. Hathaway*, 139 Conn. 258, 263, 93 A.2d 161. Courts cannot, by the process of construction, abrogate a clear expression of legislative intent, especially when, as here, unambiguous language is fortified by the refusal of the legislature, in the light of judicial interpretation, to change it. *Watrous v. Connelly*, 141 Conn. 257, 263, 105 A.2d 654; *Herald Publishing Co. v. Bill*, supra; *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 198, 33 S. Ct. 893, 57 L. Ed. 1446. In short, courts cannot write legislation by judicial decree; this is particularly so when the legislature has refused to rewrite the existing

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House passed substitute, H. Jour. p. 1339; Senate rejected, S. Jour. p. 1313; House adhered to former action, H. Jour. p. 1480.

1945 Sess. H.B. 317. AN ACT CONCERNING THE RIGHTS OF PHYSICIANS TO PRESCRIBE FOR THEIR PATIENTS (providing for permitting of physicians to prescribe methods or means for the temporary prevention of pregnancy when necessary to save life or prevent serious injury to health). Referred to committee, H. Jour. p. 263, S. Jour. p. 257; hearing held on May 1, but bill not reported thereafter.

1947 Sess. H.B. 953. AN ACT CONCERNING THE RIGHTS OF PHYSICIANS TO PRESCRIBE FOR THEIR PATIENTS (providing that physicians may prescribe for the temporary prevention of pregnancy when in the opinion of the physician, pregnancy would endanger the life or injure the health of a married woman). After receiving a favorable committee report, House passed, H. Jour. p. 733; Senate rejected, S. Jour. p. 752; House adhered to former action, H. Jour. p. 808.

1949 Sess. H.B. 1110. AN ACT CONCERNING THE RIGHT OF LICENSED PHYSICIANS TO PRESCRIBE FOR MARRIED WOMEN (providing for physicians to prescribe for the health of married women). Referred to committee, H. Jour. p. 307, S. Jour. p. 368; hearings held April 12 and May 3 (executive session) but no indication of a further report.

1951 Sess. H.B. 1483. AN ACT CONCERNING THE RIGHT OF LICENSED PHYSICIANS TO PRESCRIBE FOR MARRIED WOMEN (providing for phy-

legislation. The *Nelson* and *Tileston* decisions cannot be overruled by any attempt to reconstruct the statutes.

Since the injection of an exception by construction is legally impossible, can we now hold that the statutes are unconstitutional? By reason of the facts in the instant cases, the claims of infringement of constitutional rights

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sicians to prescribe methods or means for temporary prevention of pregnancy in a married woman when pregnancy would endanger the life or injure the health of such married woman). Referred to committee, H. Jour. p. 273, S. Jour. p. 266; hearing held April 11; bill withdrawn.

S.B. 696. AN ACT CONCERNING THE RIGHT OF LICENSED PHYSICIANS TO PRESCRIBE FOR MARRIED WOMEN (providing for birth control). Referred to committee, S. Jour. p. 192, H. Jour. p. 304; hearing held April 11, but bill not reported thereafter.

H.B. 1485 (same title and content as H.B. 1483). After references to committee by both House and Senate, House passed, H. Jour. p. 717; bill not reported from Senate committee.

1953 Sess. H.B. 1452. AN ACT AMENDING AN ACT CONCERNING THE RIGHT OF LICENSED PHYSICIANS TO PRESCRIBE FOR MARRIED WOMEN. After referral to committee by both the House and Senate, and after a petition was filed to get the bill out of committee, a favorable report was made. House passed, H. Jour. p. 1024; Senate recommitted, S. Jour. p. 942; no report thereafter.

1955 Sess. H.B. 1177. AN ACT CONCERNING THE USE OF DRUGS OR INSTRUMENTS TO PREVENT CONCEPTION (providing for the removal of the prohibition on physicians in the prescribing of the use of contraceptives). House passed, H. Jour. p. 949, Senate rejected, S. Jour. p. 1054.

H.B. 1182. AN ACT CONCERNING THE RIGHT OF LICENSED PHYSICIANS TO PRESCRIBE FOR MARRIED WOMEN (providing for the permitting of licensed physicians to prescribe and others to use and sell contraceptive devices). House passed, H. Jour. p. 954; Senate rejected, S. Jour. p. 1054.

1957 Sess. H.B. 572. AN ACT CONCERNING THE DISSEMINATION OF INFORMATION CONCERNING AND PRESCRIPTION OF CONTRACEPTIVES TO MARRIED WOMEN. House passed, H. Jour. p. 944; Senate rejected, S. Jour. p. 867.

1959 Sess. H.B. 3497. AN ACT CONCERNING PREVENTION OF CONCEPTION PURSUANT TO SPIRITUAL OR MEDICAL ADVICE. Referred to committee, H. Jour. p. 276, S. Jour. p. 292; hearing held April 24, but bill not reported thereafter.

are presented more dramatically than they have ever been before. Basically, the claims are, nevertheless, essentially the same as those which this court considered in the *Nelson* and *Tileston* cases. It may well be that the use of contraceptives is indicated as the best and safest preventive measure which medical science can offer these plaintiffs. That fact does not make it absolutely necessary for the legislature to accept such a solution in all cases, where there is, as pointed out in the *Tileston* case (p. 92), another alternative, abstinence from sexual intercourse. We cannot say that the legislature, in weighing the considerations for and against an exception legalizing contraceptive measures in cases such as the ones before us, could not reasonably conclude that, despite the occasional hardship which might result, the greater good would be served by leaving the statutes as they are.

The plaintiffs' argument raises an issue of public policy. Each of the separate magistracies of our government owes to the others a duty not to trespass upon the lawful domain of the others. The judiciary has a duty to test legislative action by constitutional principles, but it cannot, in that process, usurp the power of the legislature. *State* v. *Gilletto*, 98 Conn. 702, 714, 120 A. 567; *Lumaur* v. *Adorno*, 133 Conn. 511, 513, 52 A.2d 702; *General Motors Corporation* v. *Malquin*, 134 Conn. 118, 132, 55 A.2d 732; *State ex rel. Higgins* v. *Civil Service Commission*, 139 Conn. 102, 111, 90 A.2d 862; *Herald Publishing Co.* v. *Bill*, supra. "'The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed.'" *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 351, 57 S. Ct. 452, 81 L. Ed. 685, quoting from *Johnson* v. *United States*, 163 Fed. 30, 32; *United States* v. *Cooper Corporation*, 312 U.S. 600, 606, 61 S. Ct. 742, 85 L. Ed. 1071; *Helvering* v. *Wood*, 309 U.S. 344, 347, 60 S. Ct. 551, 84 L. Ed. 796; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 394, 60 S. Ct. 907, 84 L. Ed. 1263; *Butterworth* v. *Boyd*, 12 Cal. 2d 140, 146, 82 P.2d 434; *Collison* v. *State ex rel. Green*, 39 Del. 460, 486, 2 A.2d 97; *McDaniel* v. *Eagle Coal Co.*, 99 Mont. 309, 314, 43 P.2d 655; *Brahmey* v. *Rollins*, 87 N.H. 290, 298,

179 A. 186. We conclude that §§ 53-32 and 54-196 are a constitutional exercise of legislative power.

Although this disposes of the case, we note the claim of the defendant that in the Doe, Hoe and Poe cases the plaintiffs are obviously fictitious persons and it must necessarily follow that the questions sought to be adjudicated are academic and do not apply to any real person or persons. General Statutes, § 52-89, provides, in part, that writs in civil actions shall describe the parties, presumably by their real names, so that they may be identified. Practice Book § 199 states, among other things, that "[i]n the captions of pleas, answers, etc., the parties may be described as John Doe v. Richard Roe et al., but this will not be sufficient in a judgment file, which must give all the data necessary for use in drawing the execution." Because of the intimate and distressing details alleged in these complaints, it is understandable that the parties who are allegedly medical patients would wish to be anonymous. To obviate any possibility that the parties and the issues raised are fictitious and that the jurisdiction of the court is being invoked to decide moot questions, a plaintiff who desires to use a name other than his own should, before the case is presented in court, acquaint the court of his desires, establish the fact that the parties and issues are real although the names used are fictitious, and secure the court's consent, as was done in these cases. The privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.

There is no error.

In this opinion the other judges concurred.

[fol. 32]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

PAUL POE and PAULINE POE, of the Town and County of New Haven, State of Connecticut,

vs.

ABRAHAM S. ULLMAN, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven.

On Appeal from the Superior Court for New Haven County at New Haven.

JUDGMENT—December 8, 1959

This appeal by the plaintiffs claiming error in the process, record and judgment, and in the proceedings and decisions of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts, on file in this Court, was allowed by the Superior Court for New Haven County at New Haven, on the 11th day of February, A. D. 1959, and came to this Court, at its term held at Hartford, on the first Tuesday in March, A. D. 1959, and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Superior Court for New Haven County at New Haven, there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the appellee recover of the appellants his costs taxed at $87.20.

Date of judgment, December 8, 1959.

By the Court,

Edward Horwitz, Clerk

[fol. 33]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

JANE DOE, of the Town and County of New Haven, State of Connecticut,

vs.

ABRAHAM S. ULLMAN, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven.

On Appeal from the Superior Court for New Haven County at New Haven.

JUDGMENT—December 8, 1959

This appeal by the plaintiffs claiming error in the process, record and judgment, and in the proceedings and decisions of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts, on file in this Court, was allowed by the Superior Court for New Haven County at New Haven, on the 11th day of February, A. D. 1959, and came to this Court, at its term held at Hartford, on the first Tuesday in March, A. D. 1959, and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Superior Court for New Haven County at New Haven, there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the appellee recover of the appellants his costs taxed at $87.20.

Date of judgment, December 8, 1959.

By the Court,

Edward Horwitz, Clerk.

[fol. 34]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

C. LEE BUXTON, of the Town of Woodbridge, County of New Haven, State of Connecticut,

vs.

ABRAHAM S. ULLMAN, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven.

On Appeal from the Superior Court for New Haven County at New Haven.

JUDGMENT—December 8, 1959

This appeal by the plaintiffs claiming error in the process, record and judgment, and in the proceedings and decisions of the Court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts, on fil in this Court, was allowed by the Superior Court for New Haven County at New Haven, on the 11th day of February, A. D. 1959, and came to this Court, at its term held at Hartford, on the first Tuesday in March, A. D. 1959, and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this Court finds that in the record, judgment and proceedings of said Superior Court for New Haven County at New Haven, there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the appellee recover of the appellants his costs taxed at $87.20.

Date of judgment, December 8, 1959.

By the Court,

Edward Horwitz, Clerk.

[fol. 35] [File endorsement omitted]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

No. 4796

PAUL POE, et al., Appellants,

vs.

ABRAHAM S. ULLMAN, State's Attorney, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 19, 1960

I. Notice is hereby given that Paul and Pauline Poe, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Errors of Connecticut, dated and entered December 8, 1959, affirming a judgment of dismissal of the Superior Court for New Haven County in favor of appellee.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of so much of the record in this case as was used by the Supreme Court of Errors for transmission to the Clerk of the Supreme Court of the United States, including all pleadings, orders, judgments, and opinions therein.

III. The following questions are presented by this appeal:

Whether Section 53-32 (the criminal accessory statute) and Section 54-196 of the General Statutes of Connecticut, Revision of 1958 (making it a criminal offense for any person to "use any drug, medicinal article or instrument for the purpose of preventing conception") are unconstitutional on their face; or, as applied to both appellants, whether the said statutes deprive them of liberty without due process of law and whether, as applied to Pauline Poe,

they subject her to serious risk of loss of life and of health by reason of future pregnancies, contrary to the Fourteenth Amendment of the Constitution of the United States.

Fowler V. Harper, Attorney for Appellants, 127 Wall Street, New Haven, Conn.

[fol. 36] Proof of Service (omitted in printing).

[fol. 37] [File endorsement omitted]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

No. 4798

JANE DOE, Appellant,

vs.

ABRAHAM S. ULLMAN, State's Attorney, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 19, 1960

I. Notice is hereby given that Jane Doe, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Errors of Connecticut, dated and entered December 8, 1959, affirming a judgment of dismissal of the Superior Court for New Haven County in favor of appellee.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of so much of the record in this case as was used by the Supreme Court of Errors for transmission to the clerk of the Supreme Court of the United States, including all pleadings, orders, judgments, and opinions therein.

III. The following questions are presented by this appeal:

Whether Section 53-32 (the criminal accessory statute) and Section 54-196 of the General Statutes of Connecticut, Revision of 1958 (making it a criminal offense for any person to "use any drug, medicinal article or instrument for the purpose of preventing conception") are unconstitutional on their face, or as applied to this appellant, whether the said statutes deprive her of liberty without due process of law, and subject her to serious risk of loss of life and of health by reason of future pregnancies, contrary to the Fourteenth Amendment of the Constitution of the United States.

Fowler V. Harper, Attorney for Appellant, 127 Wall Street, New Haven, Connecticut.

[fol. 38] Proof of Service (omitted in printing).

[fol. 39] [File endorsement omitted]

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT

No. 4794

C. LEE BUXTON, Appellant,

vs.

ABRAHAM S. ULLMAN, State's Attorney, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 19, 1960

I. Notice is hereby given that C. Lee Buxton, the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Errors of Connecticut, dated and entered December 8, 1959, affirming a judgment of dismissal of the Superior Court for New Haven County in favor of appellee.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk will please prepare a transcript of so much of the entire record in this case as was used by the Supreme Court of Errors for transmission to the clerk of the Supreme Court of the United States, including all pleadings, orders, judgments, and opinions therein.

III. The following questions are presented by this appeal:

Whether Section 53-32 and Section 54-196 of the General Statutes of Connecticut, Revision of 1958, are unconstitutional as violating the Fourteenth Amendment of the Constitution of the United States, in that they deprive this appellant of his property without due process of law, since appellant is thereby prevented from practicing his profession as an obstetrician and gynecologist according to scientific principles accepted and approved by the medical profession.

Fowler V. Harper, Attorney for Appellant, 127 Wall Street, New Haven, Connecticut.

[fol. 40] Proof of Service (omitted in printing).

[fol. 41] Clerk's Certificate (omitted in printing).

[fol. 42]

SUPREME COURT OF THE UNITED STATES

Nos. 810 & 811, October Term, 1959

PAUL POE et al., Appellants,

vs.

ABRAHAM S. ULLMAN, State's Attorney;

and

C. LEE BUXTON, Appellant,

vs.

ABRAHAM S. ULLMAN, State's Attorney.

ORDER NOTING PROBABLE JURISDICTION AND CONSOLIDATING CASES—MAY 23, 1960

Appeals from the Supreme Court of Errors of the State of Connecticut.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of three hours is allowed for argument.

May 23, 1960

Mr. Justice Frankfurter took no part in the consideration or decision of these cases.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 23 1960
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 870.60

PAUL POE ET AL., JANE DOE
Appellants

vs.

ABRAHAM S. ULLMAN, *State's Attorney,*
Appellee

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

JURISDICTIONAL STATEMENT

FOWLER V. HARPER,
127 Wall Street,
New Haven, Conn.
Attorney for Appellants

THE WHAPLES-BULLIS CO., NEW HAVEN, CONNECTICUT

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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No.

PAUL POE ET AL.,

Appellants

vs.

ABRAHAM S. ULLMAN, *State's Attorney*,

Appellee

JANE DOE,

Appellant

vs.

ABRAHAM S. ULLMAN, *State's Attorney*,

Appellee

ON APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellants Doe and Poes appeal from the judgments of the Supreme Court of Errors of Connecticut entered on December 8th, 1959, dismissing their appeal from the Superior Court of New Haven and affirming the judgment of said Superior Court sustaining appellee's demurrer to appellants' action and dismissing appellants' complaint. Appellants submit this statement to demon-

strate that the Supreme Court of the United States has jurisdiction of these appeals and that substantial federal questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Errors of Connecticut rendered December 8th, 1959, is reported in 147 Conn. 48, 156 A. 2d 508.

The opinion of the Supreme Court of Errors of Connecticut is set forth in the Appendix to this Statement.

JURISDICTION

These appellants filed their writs and complaints in the Superior Court of New Haven County, Connecticut, on May 22, 1958, pursuant to Section 52-29 General Statutes of Connecticut, Revision of 1958. The complaints sought a declaratory judgment that Sections 54-196 and 53-32 of the General Statutes of Connecticut, Revision of 1958, are unconstitutional on their face or as applied to them.

Appellee Ullman filed a demurrer to each of said complaints which was sustained by the Superior Court of New Haven County, Connecticut, in a memorandum decision filed January 5, 1959. Thereafter a motion for judgment after demurrer dismissing each of said actions was sustained by said court in a ruling entered on January 21, 1959.

Appellants thereupon filed their appeal to the Supreme Court of Errors of Connecticut on February 11, 1959. Thereafter on December 8th, the Supreme Court of Errors of Connecticut affirmed the judgment of the Superior Court.

Notices of appeal to the Supreme Court of the United States were filed with the Supreme Court of Errors of Connecticut on February 19th, 1960.

Each of these causes presents a justiciable issue. The conditions which establish the validity of the declaratory procedure were recently set forth by this Court in *Evers* vs. *Dwyer*, 358 U.S. 202. These cases meet the test. All appellants have standing to sue since their vital interests are involved. Their liberty, their lives and their health are involved.

There is a real and substantial controversy presented in each case. Appellants require and seek medical advice with respect to contraceptive devices and their use which they intend to employ to preserve their lives and their physicial and emotional health. They are unable to obtain such advice and to use such contraceptive devices and instruments for the sole reason that appellee claims that both the giving of such advice and treatment by their physician as well as the use of such instruments and devices are offenses under Sections 53-32 and 54-196 General Statutes of Connecticut, Revision of 1958, and that he will prosecute (as indeed he has heretofore prosecuted in *State* vs. *Nelson*, 126 Conn. 412) any violation of said statutes. Appellants claim and appellee denies that the said statutes, on their face and as applied to them, violate the Fourteenth Amendment to the Constitution of the United States. Each question was raised and passed upon by the state court.

The questions raised here are not hypothetical nor are they contingent. What these appellants desire and propose to do in order to protect their lives, health and marital happiness is not speculative. It is definite and is clearly in violation of the challenged statutes. Nor is the threat to them vague or conditional. It is actual, specific and immediate—not fanciful, general or remote. The appellee has previously prosecuted such volations and

declares that he will prosecute further violations. "Definite rights" appear on the one side and "definite prejudicial interferences" on the other. Appellants do not seek an advisory opinion. As to them, the controversy is all too real. Certainly the facts alleged and admitted "show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Ewers* vs. *Dwyer, supra* at 203, quoting from *Maryland Casualty Co.* vs. *Pacific Coal and Oil Co.*, 312 U. S. 270, 273.

Appellants, while obviously bringing their actions under fictitious names are not fictitious persons. With the exception of names, they are accurately described in their complaints. Counsel has in his possession affidavits from each of these appellants identifying themselves with these pseudonyms and authorizing the present actions under them. The court below was convinced of the reality of these appellants and so noted in its opinion.

All appellants are entitled to have these important constitutional questions settled insofar as their claimed rights are concerned and one of the purposes of the declaratory judgment procedure is to afford a method for such determination without subjecting them to the risk of fine or imprisonment or both. Borchard, *Challenging Penal Statutes by Declaratory Actions*, 52 *Yale L. J.* 445.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Errors of Connecticut on appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on appeal in this case. *Nashville C. & St. L., R. Co.* vs. *Wallace*, 288 U. S. 249; *Ewers* vs. *Dwyer, supra* at 202; *Butler* vs. *Michigan*, 352 U. S. 380.

QUESTIONS PRESENTED

Whether Section 53-32, the general accessory statute and Section 54-196 of the General Statutes of Connecticut which makes it a criminal offense for any person to "use any drug, medicinal article or instrument for the purpose of preventing conception" are unconstitutional on their face or, as applied to appellants, in that they deprive them generally of life, and liberty without due process of law contrary to the 14th Amendment of the Constitution of the United States and particularly in that said statutes subject them to serious risk of loss of liberty, life and health by reason of future pregnancies.

STATUTES INVOLVED

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958:

Section 53-32, General Statutes of Connecticut, Revision of 1958:

> "Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 54-196, General Statutes of Connecticut, Revision of 1958:

> "Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

STATEMENT OF THE CASES

Appellant Jane Doe is a housewife who has continuously resided with her husband in New Haven since their marriage in 1954. She is 25 years old and has no living children.

Mrs. Doe was admitted to the obstetrical services of the Grace-New Haven Hospital in January, 1957, with the diagnosis of hypertensive cardio-vascular disease, toxemia of pregnancy Cushing's syndrome. It was determined by physicians in authority to terminate her pregnancy because of her condition. However, on January 28, 1957, before this procedure could be carried out, Mrs. Doe developed a cerebral hemorrhage which produced a partial paralysis. She was completely unconscious for two weeks and acutely ill for nine weeks during which time it was necessary to apply several life saving procedures. The plan to terminate her pregnancy was abandoned and on June 19, 1957, she spontaneously delivered a still born fetus. Mrs. Doe was dismissed from the hospital with the same heart condition, severe paralysis of the right leg, total paralysis of the right arm, residual kidney damage, marked impairment of speech and serious emotional instability.

It is the opinion of appellant's physician, Dr. C. Lee Buxton, that another pregnancy would be exceedingly perilous to life.

The appellant needs and requires and has asked her physician for medical advice to prevent further pregnancies. It is the opinion of said physician that the best and safest medical treatment would be to inform her as to methods of preventing conception by the use of medical articles and instruments. Appellant has been unable to obtain such advice and to use such medical instruments for the sole reason that the appellee, State's Attorney, claims that the giving of such information and the use of such instruments are prohibited by Sections 53-32 and 54-196 of the General

Statutes of Connecticut, Revision of 1958 and that he will prosecute any violation of such statutes.

Appellant Doe claims that said statutes are unconstitutional on their face and, as applied to her in her condition of health, deprive her of constitutional rights under the due process clause of the 14th Amendment to the Constitution of the United States and in her complaint she asked the state court so to declare. Appellee, State's Attorney, demurred to appellant's complaint thereby admitting all of the aforesaid facts as alleged in appellant's complaint. The demurrer was sustained. After final judgment for appellee dismissing the action, and affirmance by the Supreme Court of Errors of Connecticut, appellant appeals to this Court and prays that the judgment of the Connecticut courts be reversed and that the statutes in question be declared unconstitutional.

Appellants Paul and Pauline Poe are husband and wife who live together in New Haven. Mr. Poe is a businessman and Mrs. Poe is a housewife. She is 26 years old; he is 30. They have no living children.

Mrs. Poe has had three consecutive pregnancies, each of which has terminated in the delivery of an infant with multiple congenital abnormalities inconsistent with life. The first infant was delivered in January, 1954 with congenital heart disease and kidney abnormality. It died on the 9th day of life. The second child was born in April, 1955, and was a Mongoloid with associated renal and cardiac lesions. It expired within six days. The third child was born in October, 1957, with evidence of cerebral and gastro-intestinal maldevelopment. It perished within ten weeks. It is the opinion of appellant Buxton that even if these children had survived it is highly unlikely that any of them would have had a normal life. The cause of these abnormalities is thought by their physician and other specialists to be genetic but they have been unable to make a successful prognosis and treatment.

Appellants have already suffered great emotional distress as a result of these successive tragedies and another pregnancy would be extremely disturbing to their physical and mental health.

In other respects, the case of these appellants is similar to that of appellant Doe.

THE QUESTIONS ARE SUBSTANTIAL

These cases raise fundamental questions of life and personal liberty never passed upon by this Court. Cf. *Tileston* vs. *Ullman*, 318 U. S. 44. The challenged statutes purport to regulate the behavior of married persons in the privacy of their homes in an arbitrary manner which restricts their liberty and seriously jeopardizes the lives and health of spouses, their happiness, the solidarity of the family and the future welfare of their children. Again the statutes fly in the face of medical science and prohibit, restrict and regulate the proper and approved practice of medicine in the field of gynecology and obstetrics.

POINT I

Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958, involve one of the basic civil or human rights of man.

The right to marry and establish a home, recognized in *Meyer* vs. *Nebraska*, 262 U. S. 390, 399, necessarily implies the right to engage in normal marital relations. And the right to engage in such relations embodies a personal freedom or privilege to procreate or not procreate as the individuals may desire or as medical factors may dictate. This right must therefore be considered as one of the bundle of rights which are "fundamental to the very existence and survival of the race" particularly when considered in the context of serious threats to life itself. See *Skinner* vs. *Oklahoma*, 316 U. S. 535, 541.

Like the right "to marry, establish a home and bring up children," this freedom to engage in marital relations as the spouses see fit "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect." *Meyer* vs. *Nebraska, supra* at 399-400. Just as there are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of individuals (see Jackson, J., concurring in *Skinner* vs. *Oklahoma, supra* at 546), so too there are limits to which the Connecticut legislature may impinge upon or conduct experiments with the dignity, powers and freedoms of married individuals in their most intimate relationships.

Such limits are exceeded where the legislative mandate compels the spouses to make an unreasonable or irrational choice in conducting their marital relations. Connecticut has here imposed just such a choice. It has said that the appellants may choose between one of two alternatives only: (1) they may engage in marital relations without the use of contraceptives but at grave risks to life and health of the wives and possible children, or (2) they may abstain completely from such relations and thus, as will be shown in Point IV, forego or frustrate a fundamental of the marriage state. Legislation which leaves total abstention as the only alternative to death or impaired health is on its face arbitrary and unreasonable. It imposes on the individuals involved an illusory choice "between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood [or to married life, in this case], or to submit to a requirement which may constitute an intolerable burden [intolerable here to health and life itself]." *Frost* vs. *Railroad Commission*, 271 U. S. 583, 593.

This Court has recognized that a statute which imposes a police regulation on an individual at the expense of impaired health or possible death would be "cruel and inhuman in the last degree" and obviously unconstitutional. *Jacobson* vs. *Massachusetts*, 197 U. S. 11, 38-39. When such an illegal exaction is combined with an alternative of refraining from an act so vital to the maintenance of a healthy marriage, the result is an unreasonable and arbitrary intrusion into the private affairs of the citizens of Connecticut. And it is an intrusion that is nowhere justified by the legislature on grounds of public health, morality or medical desirability. Such legislation cannot stand by virtue of the due process clause of the Fourteenth Amendment.

POINT II

Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958 are unconstitutional on their face and particularly as applied to all these appellants because they are not reasonably related to the evil which they are intended to abate.

There are no legislative findings with respect to the conditions which gave rise to the enactment of Section 53-32 nor as to the purpose thereof. See *Talley* vs. *California*, March 7, 1960, 28 Law Week 4186. Actually the statute was enacted in 1879 as a part of a general obscenity law entitled "An Act to Amend an Act Concerning Offenses Against Decency, Morality and Humanity." See dissenting opinion in *Tileston* vs. *Ullman*, 129 Conn. 84, 98. Presumably the statute is intended to promote the public welfare by restricting immoral practices. The only specific immoral behavior suggested by the Supreme Court of Errors of Connecticut is the prevention of illicit relations on the theory that the free availability and use of contraceptives would encourage promiscuity. *State* vs. *Nelson*, 126 Conn. 412, 425. This argument fails because these laws do not prevent the sale or

use of devices for the prevention of disease. See *Commonwealth* vs. *Corbit*, 307 Mass. 1, 29 N. E. 2d 151; *Commonwealth* vs. *Werlinsky*, 307 Mass. 608, 29 N. E. 2d 150, cited with apparent approval in *Tileston* vs. *Ullman*, 129 Conn. 84, 91. Nor are contraceptives subject to seizure by the State. *State* vs. *Certain Contraceptive Materials*, 126 Conn. 428. Due process requires that "the means adopted shall have a real and substantial relation to the object sought to be obtained." *Nebbia* vs. *New York*, 291 U. S. 502, 525. Since the same devices which prevent the transmission of venereal disease as a result of intercourse also prevent conception, the law does not and cannot accomplish its purpose.

POINT III

Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958, are unconstitutional on their face and particularly as applied to all these appellants in that they are not reasonably restricted to the evil which they are intended to abate.

In *Butler* vs. *Michigan*, 352 U. S. 380, this Court held unconstitutional a statute prohibiting the sale of printed matter, pictures, etc., "manifestly tending to the corruption of the morals of youth" because it was interpreted as preventing the sale of such matter to adults who would be immune to their corrupting influence. The statute was too broad. It reduced the reading matter of adults to that which was fit for children.

In this case the statutes also "burn down the house to roast the pig." They prohibit to married persons practices not only harmless to them but highly useful if not necessary to maintain life, health and marital happiness, in order to prevent unmarried persons from engaging in such practices which as to them would be illegal and corrupting.

It requires little imagination to conceive of reasonable methods for accomplishing the apparent purpose of these statutes, i.e. mak-

ing contraceptive devices unavailable to unmarried persons. Indeed, since they are in effect now available to such persons, far more effective methods are readily suggested, as for example, prohibiting the sale of contraceptive devices except on prescription by a physician and prohibiting such prescription except to married persons. If it be argued that unmarried persons may misrepresent themselves as married, at least one answer is that such persons may and notoriously do make similar misrepresentations to hotels when registering for rooms. But no one would defend the constitutionality of a law which abolished hotels for the avowed purpose of preventing fornication and adultery. A far less unreasonable law although patently one causing inconvenience could require the display of a marriage certificate as a passport to a hotel room. The same type of law could apply to a physician's prescription.

POINT IV

The Connecticut statutes are unconstitutional on their face and particularly as applied to all appellants in that they unreasonably prohibit the more desirable, effective and reliable methods for the prevention of conception but permit the use of the more undesirable, ineffective and unreliable methods.

Numerous studies have demonstrated the superiority of the vaginal diaphragm and condom over other methods of preventing conception. For example, Guttmacher, Tietze and Rubin found a failure of contraception in 14 per cent of the cases studied by couples relying on the condom, 17.2 per cent by those employing the diaphragm and 48 per cent by persons employing all other methods.[1]

The most recent study was made by the Office of Population Research of Princeton University under the auspices of the Mil-

[1] *Journal of American Medical Association*, Vol. 140, p. 1265.

Bank Memorial Fund. It discloses pregnancy rates per 100 years of exposure for the most widely used methods as follows:[2]

Condom	14
Diaphragm	14
Rhythm	38
Douche	41

Guttmacher in a poll of 3,381 physicians found the following results as to patient acceptability, trustworthiness and prescription by them.

Reliability and Acceptability of Methods Prescribed[3]

Method	Percentage of Doctors Indicating Technique As First Choice For		
	Prescription	Reliability	Acceptability
No. of doctors indicating one or more techniques	2,516	2,726	2,739
	Percent		
Diaphragm and jelly or cream	69.6	62.1	67.4
Condom	9.5	14.1	6.4
Rhythm	4.7	1.4	4.7
Condom and jelly or cream	3.7	7.7	4.3
Jelly or cream alone	3.5	1.5	6.5
Cervical cap	2.3	1.8	2.2
Abstinence	1.5	8.0	1.2
Douches	2.4	0.8	2.0
Intracervical stem pessary	1.3	2.2	1.4
Foam Powder and Sponge	0.4	0.1	0.2
Suppositories	0.6	0.1	0.8
Withdrawal	0.7	0.3	0.2

[2] This study has not yet been officially published. The data quoted, however, was released to Dr. Tietze and included in his recent monograph, *The Condom as a Contraceptive*, Publication No. 5, National Committee on Maternal Health, p. 36 (1960).

[3] *Human Fertility*, Vol. 12, No. 1 (March, 1947).

If it is argued as it was in the opinion below (156 A.2d 514, citing *Tileston* vs. *Ullman*, 129 Conn. 92, 26 A.2d 586), that total abstinence is the one sure way to prevent conception it should be enough to state that it is common knowledge that for all societies in all ages it has not worked. One can hardly expect anything good to come from a fallacy so patent. It is simply too much to ask young married people deeply in love to abstain from marital relations for extended periods of time. Moreover such abstinence is well understood by psychiatry to impair the mental health of the parties and to discourage the development of a full and happy family life. Fifteen years ago Dr. Karl Menninger wrote: "The impulse for sexual union travels a long complicated path and becomes entwined, as Havelock Ellis says 'with all the highest and subtlest human emotions and activities' . . . The thwarting of this means the interference with the harmony of human affection which law, religion and social custom take at such pains to nature. Denied it, the suppressed energies become diffused, distorted and capable of pathological expression."[4]

In addition to being highly undependable, *coitus interruptus* is definitely harmful. Freud blamed much neurotic disorder of women on the practice.[5] To a lesser extent other methods may create anxiety because of their fallibility, or by the fact that their effective use depends on the cooperation of the husband. None of these less satisfactory means of contraception is in fact withheld from the public by the Connecticut statute. It is only the safest, the least anxiety-provoking and most aesthetic, the diaphragm and condom, which are effectively interfered with.

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[4] *Psychiatric Aspects of Contraception*, Bulletin of the Menninger Clinic, Vol. 7, p. 30. To the same effect see Otto Fenichel, *The Psychoanalytic Theory of Neurosis*, p. 455 (1945) and Karen Horney, *The Neurotic Personality of Our Times*, pp. 158-159 (1937).

[5] *Collected Papers*, Vol. I, pp. 88, 147, 217 (London, 1950).

It seems clear that while no method of contraception has yet been devised which is foolproof, those depending upon the fickle cooperation of nature are the least reliable.

POINT V

The statutes are unconstitutional on their face and particularly as applied to these appellants in that the hardship on them and the injurious social consequences of these laws so far outweigh any real or fancied benefits as to constitute an invasion of life and liberty without due process of law.

A

The Supposed Advantages of These Laws.

1. The only specific advantage relied upon by the Supreme Court of Errors is that the statutes prevent meretricious relations between the sexes. That they do not and cannot accomplish this purpose has been demonstrated under Point II.

2. It is nowhere expressed either in the legislative history of these laws nor in the judicial interpretation thereof that intercourse between spouses for the sole purpose of expressing mutual love and affection is immoral. But assuming that it is the purpose of the laws to prevent intercourse between married persons otherwise than for propagation as immoral, it is submitted that such purpose is constitutionally untenable. Unless morality is to be determined by *a priori* reasoning from preconceived premises, there must be some kind of pragmatic test by which presumed legislative findings and purposes are to be appraised. Surely the Constitution, conceived for the guidance and the protection of human beings, is not to be interpreted in a vacuum.

This Court has laid down a standard for determining the morality of human behavior in the opinion by Mr. Justice Brennan in

Roth vs. *United States*, 354 U. S. 476. The obscene character of a publication is to be determined by its appeal to prurient interest, applying "contemporary community standards." The publication or distribution of obscene matter is one form of immoral behavior. No reason is to be perceived why a different standard should be applied as a test for other immoral practices. Indeed, Mr. Justice Holmes anticipated such a test almost 50 years ago in *Noble State Bank* vs. *Haskell*, 219 U. S. 104, 111: "It [the police power] may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare." If this standard is applied to the practices of contraception proscribed by the Connecticut statutes, it will be seen that the overwhelming majority of the community regards them as desirable, decent and moral. Substantial segments in our society regard them not only consistent with the highest standards of morality but as required by religious faith.

In a recent survey by Freedman, Whelpton and Campbell[6] all population groups "accept the idea of couples deliberately regulating the number and spacing of their children in relation to their needs and resources." Less than 5 per cent expressed unqualified disapproval. Even among Roman Catholic wives only 13 per cent avowed such sentiments. "In our sample," they said (*ibid.* 52) "83 per cent of the fecund couples (those who find that they can have children easily) had adopted contraception; 7 per cent more planned to do so after having one or more children they still wanted. We think that the proportion may actually exceed 90 per cent, because many couples who are indifferent or opposed to contraception in early married life adopt some method when confronted with a rapidly growing family." As to unqualified approval by religious groups, the authors conclude that "most Protestants and a great majority of Jews but a minority

[6] *Scientific American*, April, 1959, pp. 50 ff.

of Catholics" take such a position (*ibid.* 54). The Catholic minority, however, was substantial (35 per cent) and the Protestant majority definite (73 per cent).

In a survey by the Harvard Crimson of Harvard and Radcliffe students,[7] the results showed that only 7 per cent disapproved birth control (no qualification appeared in the question).

The results of a recent Gallup poll disclosed that 72 per cent of the persons interviewed believed that contraceptive advice should be available to all who desired it; 14 per cent had no opinion; the other 14 per cent believed otherwise.[8]

The 171st General Assembly of the United Presbyterian Church of the U. S. A. held in June, 1959, in Indianapolis adopted a resolution declaring that the "sexual life" of a christian marriage is "given by God for the benefit of his children and is neither an ethically neutral aspect of human existence nor an evil which needs to be justified by something else, as for example, by the procreation of children." The resolution further declared that the proper use of "medically approved contraceptives may contribute to the spiritual, emotional and economic welfare of the family."[9]

The Lambeth Conference, 1958 (Church of England and Episcopal Churches of the World) adopted the following resolution: "The Conference believes that the responsibility for deciding upon the number and frequency of children has been laid by God upon the consciences of parents everywhere; that this planning, in ways that are mutually acceptable to husband and wife in Christian conscience is a right and important factor in Christian family life and should be the result of positive choice before God. Such

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[7] *Time Magazine*, June 22, 1959, p. 56.

[8] Reported in the New York *Herald-Tribune*, Feb. 18, 1960.

[9] *Time Magazine*, June 8, 1959.

responsible parenthood, built on obedience to all the duties of marriage, requires a wise stewardship of the resources and abilities of the family as well as a thoughtful consideration of the varying population needs and problems of society and the claims of future generations."[10]

At its 95th Synod in Los Angeles, 1954, the Augustana Lutheran Church unanimously adopted the following resolution:

> "5. The means which a married pair uses to determine the numbers and spacing of the births of their children are a matter for them to decide with their own consciences, on the basis of competent medical advice and in a sense of accountability to God.
>
> "6. So long as it causes no harm to those involved, either immediately or over an extended period, none of the methods for controlling the number and spacing of the birth of children has any special moral merit or demerit."[11]

The United Lutheran Church, at its 20th Biennial Convention resolved that "Choice as to means of conception control should be made upon professional medical advice."

Although the theological position of the Roman Catholic Church prohibits the practice of contraception by "artificial" means to members of the faith, there is eminent Catholic authority that it is morally wrong to enforce by law this dogma upon persons whose religious and ethical convictions are the other way. Thus, Vernon J. Bourke, a distinguished philosopher has recently written:[12]

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[10] *Report of the Lambeth Conference*, 1958, S.P.C.K. and Seabury Press, London and Greenwich, Conn., No. 115, p. 157.

[11] *Report of the Ninety-fifth Synod* (D. Verner, ed.), pp. 229-232 (1954).

[12] Moral Problems in Censoring, 40 *Marquette L. Rev.* 57, 68 (1956). See also John Courtney Murray, *Religion in America* (John Cogley, ed.), pp. 32-33 (1959).

"Are Catholics, living as citizens of a democratic country, justified in seeking government restraint of the dissemination of information on birth-control practices? Before examining this, let us remember that we are talking about a pluralistic society, a society in which there are diverse views on the moral value of birth-control data . . .

"Remembering that these conflicts arise because of varying notions of what is morally acceptable, I think we may say three things about them. First, each minority group has a right, even with a large pluralistic society, to censor *for its own members* the use of media seriously considered harmful for that group. Secondly, one minority group in a pluralistic society does not have a moral right to demand government censoring of the expression of the foregoing sort of information *for members of other groups*, who do not share the same standards . . ."

If morally wrong, it is difficult to sustain the validity of these laws as reasonable restrictions upon personal liberty.

It would seem obvious that if a law prohibiting control of births by scientific means is to be judged by "contemporary community standards," these Connecticut laws are beyond the power of state legislatures which enforce upon all married people the limitations approved by a small minority of the public and an infinitesimal minority of the medical profession.

In fact, the medical profession overwhelmingly approves the use of contraceptives proscribed by the Connecticut law. In a poll taken in 1947 by a distinguished physician, it appeared that 97.8 per cent of American doctors approved contraception as a medical technique.[18] Some twenty-odd years ago the House of Delegates of the American Medical Association adopted a Com-

[18]Guttmacher, *Conception Control and the Medical Profession*, *Human Fertility*, March, 1947, and see Pilpel, The Legal Status of Contraception, *North Carolina L. Rev.*, April, 1944.

mittee Report recommending that medical students "be instructed fully concerning fertility and sterility and taught the clinical considerations and therapeutic applications of contraceptive methods."[14]

B

The Injurious Effects of This Legislation On These Appellants and Society.

1. These laws are a colossal irrelevancy to any proper concern of the legislature of the state of Connecticut. They regulate intimate and personal relations between spouses. When the long arm of the law reaches into the bedroom and regulates the most sacred relations between a man and his wife, it is going too far. There must be a limit to the extent to which the moral scruples of a minority, or for that matter of a majority, can be enacted into laws which regulate the sex life of all married people.

Appellants are not contending that their rights of privacy, as such, are directly protected by the Fourteenth Amendment. They do submit, however, that their privacy is mercilessly invaded by these laws and that, this being so, it is an highly important factor for this Court to consider in weighing the hardship upon individuals against the theoretical, if not entirely fictitious, advantages of the laws as promoting public morality. This Court has never regarded the question of reasonableness as an abstract problem. It is one to be considered in the light of the facts of life in our culture. If there is one social fact of our society which is undeniable, it is that the normal and voluntary relations of spouses in the privacy of their homes is regarded as beyond the prying eyes of peeping Toms, be they police officers or legislators.

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[14] *Journal of the American Medical Association*, Vol. 108, p. 2217 (1937).

In the Capitol Transit case (*Public Utilities Commission* vs. *Pollak*, 343 U. S. 451) this Court declined to protect the privacy of 3 per cent of the people who ride the Washington buses against annoying radio programs. By riding in a public vehicle, they forfeited protection which they otherwise might have claimed. Their privacy was "substantially limited by the rights of others" (76.3 per cent of the travelling public favored the programs). It was held that the appellants' position "wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the federal government a right of privacy substantially equal to the privacy to which he is entitled in his home."

These appellants complain that it is precisely their privacy in their homes and, indeed, in the most private part thereof that is invaded. They want to be let alone in the bedroom. They insist that marital intercourse may not be rationed, censored or regulated by priest, legislator or bureaucrat. Certainly, they contend, the "liberty" guaranteed by the due process clause includes this, among the most sacred experiences of life. The decision in the *Capitol Transit* case may well have been different if 76.3 per cent of the travellers objected to the programs. In this case it is to be observed that an overwhelming majority of persons favor conception control, most of them, without qualification. In any event, it is to be stressed that unlike the *Capitol Transit* situation, the claimed rights of the majority here in no way collides with the rights of the minority who disavow some, but not all, methods of control of births.

The contention of these appellants is that their right to use contraceptive devices is beyond the reach of a law which, at most, has highly dubious claims to the promotion of public morality, in that (1) it concerns only the spouses themselves, (2) it takes place in the privacy of their homes, (3) it is not only harmless to them but according to the all but unanimous medical opinion it is necessary to preserve life in some cases, health and familial

happiness in others and is in accord with scientific judgment as to necessary population control to promote the welfare of mankind generally.

In other words, these married persons contend that they have a constitutional right to marital intercourse in the privacy of their homes under medically approved conditions and under circumstances mutually satisfactory to them. What right, it may be asked, is more fundamental or more sacred?

2. These laws result in unwanted children.

Certainly among the most unfortunate of children are those brought into life unwanted by their parents. Their unhappiness is not because their stars are bad nor because their parents are bad. It is their lot to be the result of accidents and these laws make every fertile married couple in the state of Connecticut accident prone. The question presented here is how such laws can be held anything but unreasonable.

The unwanted child is of serious concern to psychiatrists. Karl Menninger makes much of this.[15] He says: "We must admit that sometimes even the unplanned-for, unwanted, unexpected child may stimulate enough love in the parents to overcome their initial hostility toward him . . . ." But often the parents are unable to suppress or repress their hostile feelings completely. They may fool themselves and others, but they do not fool the child. The child senses that he is not wanted, and the joy and promise of his life are blasted from the very start by this realization, dim and unverbalized though it may be."

"Blessed are the little children" is a beautiful sentiment. As a sociological propostion in today's world, it is often a figure of speech and should not be mistaken for a fact. Some children are blessed, indeed, but the unwanted child is not one of them.

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[15] *Love Against Hate*, pp. 223-225 (1942).

3. These laws impair and restrict the right of spouses to plan their family in a way calculated to obtain the optima advantages of family life.

Although this Court has declared that the term "liberty" includes, among other things, "the right of individuals to acquire useful knowledge, marry, establish a home and bring up children." (*Meyer* vs. *Nebraska*, 262 U. S. 390, 400), many young couples can plan neither their families nor their lives in the face of these Connecticut laws. Consider, for example, a student in a professional school, and his wife a graduate student in the university.[16] They are largely supported by his salary as a part-time instructor in the undergraduate school. They desire to plan their children both as to time and number. A pregnancy at this time would disrupt the wife's education, and seriously increase the economic problems of the couple who desire to limit their children to the point where they can give them the advantages of a good home and education. Moreover, they are convinced that spacing of their children is essential to the health of the wife. The Gutmacher poll of 3,381 doctors[17] indicated the minimum safe interval, so far as the mother's health was concerned, was twenty-

[16] The bulletins of Yale University disclose that during the academic year 1958-1959 there were 1,372 graduate and professional married students enrolled.

[17] *Human Fertility*, Vol. 12, No. 1 (March, 1947).

three months between children. This was the average. The following table summarizes the results:

Replies to the Question Concerning the Desirable Interval Between the Termination of One Pregnancy and the Beginning of the Next After a Viable Birth

Average Interval	No. of Respondents	Per Cent
Any time	6	0.2
1-3 months	129	3.8
4-6 months	295	8.7
7-9 months	197	5.8
10-12 months	885	26.2
13-18 months	714	21.1
19-24 months	699	20.7
25-36 months	111	3.3
37-48 months	5	0.1
49 months and over	1	0.0
Don't know	23	0.7
Not stated	216	6.3
Total	3,281	99.9

Years ago, it was demonstrated that even among healthy mothers, as the period of time between births decreases, the chances for the survival of each subsequent child, as well as that of the mother, decreases.[18]

The Connecticut statutes here in question deprive such young people of the liberty assured to them by the 14th Amendment of the Constitution of the United States. Certainly that renascence of ideas which brought a recognition of the importance of the individual should afford protection in the management of their family affairs within the framework of the marital relation as

[18] Bromley, *Birth Control, Its Use and Misuse*, pp. 20 ff. (1934); *Childrens Bureau Publication No. 142, Causal Factor in Infant Mortality* (1940).

it is known in the Christian and Judaic culture of the Western world. It would seem clear that if state legislation made it a criminal offense for any married couple to have, say, more than two children, this Court would strike it down as interfering with rights so deeply rooted in our culture and our law as to be a denial of due process. It is submitted that legislation which prohibits a married couple from limiting and spacing the number of their children by the most effective, scientifically approved methods, is no less an invasion of liberty which is intolerable.

It may, indeed, be true that if present population trends continue our society may, for mere survival, be compelled to find constitutional means to restrict the number of births by the most effective means possible. One way calculated to bring about such a tragic situation is to prohibit by law voluntary limitation on the birth of children.

4 These laws encourage abortion, illegal as well as therapeutic. It is argued that these laws can be justified as in the interest of public morality. The best scientific opinion is that they contribute to public immorality by the creation of situations leading to illegal abortion. Here again there is no substantial relation between the legislation and the desired end. It encourages more evil than it averts.

Because of the absence of satisfactory studies of the subject, a recent conference on abortion in the United States, held at Arden House under the auspices of the Planned Parenthood Federation, was unable to reach any clear conclusion as to the relationship of birth control education to abortion. Many of the experts present, however, felt that their clinical observations justified an impression that the abortion rate could be reduced by more widespread use of contraception. The final cautious conclusion of the conference on this question was: "It was recognized by the Conference participants that no scientific evidence has been devel-

oped to support the claim that increased availability of contraceptive services will clearly result in a decreased illegal abortion rate. The absence of such evidence, however, does not rule out the theoretical likelihood that it does. Therefore, it would be a constructive step if facilities for obtaining advice on contraception should be extended under medical supervision, to make such advice freely available to all who desire it."[19]

Some more positive statements of opinion on the subject: Dr. Sophia J. Kleegman, Clinical Professor of Obstetrics and Gynecology, N. Y. U. College of Medicine: "Education in conception control, during the premarital and postpartum medical examination is the most effective step to be advocated for preventing both therapeutic and criminal abortion . . . . Modern methods of family planning, it should be emphasized, would prevent 90-95% of all abortion deaths."[20] Dr. Kleegman also says: "For many years, whenever I was on service, I have interviewed every patient who had a therapeutic abortion. Most of them had been under the care of some health or welfare agency for years. Only one of these had ever been referred to a contraceptive clinic by a social worker. I know, in my private practice, when patients have this medical care when needed, there is a definite reduction in the number of legal or illegal abortions subsequently sought and received." She also says that in her private practice she often persuades patients not to seek illegal abortions, promising them birth control instruction later to prevent further unwanted pregnancies. "It is this promise that is the greatest help in persuading many a woman to continue a pregnancy that she would not otherwise carry on."[21]

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[19]Calderone, *Abortion in the United States*, p. 182 (1958).

[20]Kleegman, Sophia, *Planned Parenthood. Its Influence on Public Health and Family Welfare*, in Rosen, Harold, ed., *Therapeutic Abortion*, p. 254 (1954).

[21]Calderone, *op. cit.* pp. 111-113.

The late Dr. Abraham Stone, one time Vice President, Planned Parenthood Federation of America: "I believe that there is a high correlation between the lack of use of contraception and the high incidence of abortion; the more contraception is used, the less abortion there will be. While I do not have the figures here; I know from the more than 140,000 couples that have come to the Margaret Sanger Research Bureau that those who have come early in marriage and obtained competent contraceptive information have had definitely fewer abortions than those who have not used any contraceptive measures at all."[22]

5. These laws expose married women and their husbands to serious hazards of death and physical and mental illness.

The statutes forbidding contraceptive medical advice and the use of contraceptive devices constitute an unreasonable infringement of the liberty of these married people not only generally but also because of the risk to life and health which will result from further pregnancies.

In *Tileston* vs. *Ullman*, *supra* at 586, the Connecticut court said:

> "The claim of the state on this point comes down, then, to a consideration whether abstinence from intercourse is a reasonable and practical method of preventing the unfortunate consequences. Certainly it is a sure remedy. Do the frailties of human nature and the uncertainties of human passions render it impracticable? This is a question for the legislature and we cannot say it could not believe that the husband and wife would and should refrain when they both know that intercourse would very likely result in a pregnancy which might bring about the death of the wife.
>
> "The legislature is the final forum."

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[22] *Ibid.*, p. 159.

But the legislature is the final forum only so far as concerns the choice of reasonable alternatives and the overwhelming verdict of medical science is that abstinence is neither reasonable nor practical because normally sexed persons the age of these appellants cannot abstain for extended periods without the development of anxiety neuroses or the impairment of the marriage relation. And, although the Connecticut court mentioned only abstinence as an alternative, there are others. It is submitted, however, that they are all unreasonable.

Sterilization. This is unreasonable because persons such as the Poe appellants may, if adequate diagnosis and treatment are obtained, at some future time be capable of having normal children. But sterilization is irrevocable—like the unwanted child.[29]

Abortion. This is unreasonable because if for no other reason, in the case of appellant Doe, the termination of a pregnancy could create a risk greater than that of the birth of a child. Her physicians abandoned their plan to terminate her last pregnancy for this reason after the cerebral hemorrhage.

Divorce. It can hardly be supposed that any one would seriously contend that a reasonable way for a woman in love with her husband to avoid pregnancy would be to obtain a divorce—assuming that it could be lawfully obtained.

Permitted practices to prevent conception. Practices such as the rhythm system, the use of the douche, *coitus interruptus* and absolute abstinence are all so unreliable that the risk involved is unreasonable for women whose life or health would be imperilled by pregnancy. Moreover, as shown elsewhere, in many instances these practices themselves threaten the mental health of both spouses.

The Guttmacher poll of 3,381 physicians with respect to medical indications for conception control gave the following results:[23]

Number and Percent of Physicians Approving Conception Control for the Different Indications

Indication	Number		Per Cent	
	Yes	No	Yes	No
Cardiac	3,002	379	88.8	11.2
Pulmonary disease	2,925	456	86.5	13.5
Renal disease	2,840	541	84.0	16.0
Nervous and mental disease	2,823	558	83.5	16.5
Great multiparity	2,691	690	79.6	20.4
Hypertension	2,678	703	79.2	20.8
Diabetes	2,571	810	76.0	24.0
Exopthalmic goitre	2,494	887	73.8	26.2
Prevention of inherited disease or malformations	2,447	934	72.4	27.6
Recent pelvic operation	2,419	962	71.5	28.5
General debility and anemia	2,349	1,032	69.5	30.5
Venereal disease	2,230	1,151	66.0	34.0

It thus seems clear that there are no reasonable alternatives to the use of the forbidden contraceptive devices for the women whose life and health will be put in jeopardy by another pregnancy. In other words, the laws of the State permit these appellants to try to preserve their lives and health—only by the methods least likely to succeed.

But in cases where life is in jeopardy even a reasonable alternative may not save an otherwise unconstitutional act. Thus in *England* vs. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626 (1958) the court said: "Under all the cases we think it is that the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his

[23] *Human Fertility*, Vol. 12, No. 1, March, 1947.

ills . . . ." Certainly it cannot be contended that a young woman for whom another pregnancy involves a serious threat of death adopts an unreasonable choice of treatment when, on her physician's advice, she turns to the forbidden contraceptives.

Although it may not be true in all societies, certainly human life is among the highest of values in our culture. Even with us, a few stalwart patriots may put the alternatives as liberty or death, but the average citizen prizes his life above his liberty and certainly above his property. It would seem self-evident that life is not to be equated with property in the application of the due process clause of the Constitution. Thus legislation which threatens life will require far more to justify it than that which involves property. A more realistic classification would include life with those First Amendment rights which receive the highest protection known to our system of law: the rights to think, speak and freely practice religion.

We do not invoke the phrase "preferred position" of First Amendment guarantees insofar as that phrase may be equated with a presumption of unconstitutionality. We do not argue that there exists such a presumption. At the same time we think it can be maintained, both on the basis of decisions of this Court as well as the language used, that the application of the doctrine of reasonableness to statutes limiting speech and religious practices may produce quite different results than when used in connection with other due process problems. For example, the purpose of keeping the streets clean is insufficient to justify an ordinance prohibiting the distribution of religious literature (*Schneider* vs. *New Jersey*, 308 U. S. 147), although it may be adequate when all that is involved is the distribution of handbills advertising a prize fight or a street carnival. See *Breard* vs. *Alexandria*, 341 U. S. 622.

The standard may well be the same for judging legislation threatening life or making inroads on personal liberty on the one hand and economic freedom on the other. But legislative curtailment of freedom of the market place and the right to acquire and use property may be justified to avert evils which reasonable men would find altogether inadequate in the case of abridgment of speech, the prohibition of the free practice of religion or a serious threat to life itself. In other words, although there may be a presumption of constitutionality of statutes directed at those rights enshrined in the First Amendment and where human life is involved, it is submitted that the burden of overcoming the presumption is far less onerous than in the case of other restrictions. The curtailment in the former situation may be intolerable, whereas reasonable people would regard the price not too high in a situation involving only money.

CONCLUSION

The issues in these cases are fundamental and touch the most delicate aspects of the private lives of these appellants in particular and the people of Connecticut in general. They involve the most intimate relation of married persons; they involve the lives and health of married women and the emotional stability of their husbands; they thus involve the welfare of future generations; they involve the economic and social welfare of the entire community; and it is submitted they involve the Constitution of the United States in that the laws in question are invalid under the Fourteenth Amendment thereto.

Respectfully submitted,

FOWLER V. HARPER,
127 Wall Street
New Haven, Conn.

APPENDIX

Supreme Court of Errors

OCTOBER TERM, 1959

PAUL POE ET AL.

Appellants

v.

ABRAHAM S. ULLMAN, *State's Attorney*,

Appellee

JANE DOE

Appellant

v.

ABRAHAM S. ULLMAN, *State's Attorney*,

Appellee

Actions for declaratory judgments determining the constitutionality of legislation forbidding the use and prescription of contraceptive devices, brought to the Superior Court in New Haven County, where demurrers to the complaints were sustained, *Healey, J.*, and, the plaintiff failing to plead further, judgments were rendered in favor of the defendant, from which the plaintiffs appealed. *No error.*

Catherine G. Roraback, for the appellants (plaintiffs).

Raymond J. Cannon, assistant attorney general, with whom, on the brief, was *Albert L. Coles*, attorney general, for the appellee (defendant) in each case.

BALDWIN, C. J. The complaints in these four actions seek declaratory judgments as to the constitutionality of § 53-32 of the General Statutes, prohibiting the use of any drug, medicinal article or instrument for the purpose of preventing conception, and

§ 54-196, prohibiting the counseling or abetting of such use.[1] The plaintiff C. Lee Buxton is a licensed physician. The plaintiff Jane Doe is a married woman living with her husband. The plaintiffs Paul and Pauline Poe, as well as the plaintiffs Harold and Hanna Hoe, are husband and wife. Except for Dr. Buxton, all the plaintiffs are using, for the purpose of this litigation, fictitious names. They are patients of Dr. Buxton. The plaintiffs claim that the two statutes deprive them of rights guaranteed by the fourteenth amendment to the federal constitution. The defendant demurred to all the complaints; among his grounds were that the plaintiffs were seeking declaratory judgments on legal issues already conclusively determined by this court and that the passage of time and a change in the personnel of the court would not justify a reversal of these determinations. The trial court sustained the demurrers on these grounds, and the plaintiffs have appealed.

A demurrer to a complaint for a declaratory judgment is proper when the facts alleged do not bring the case within the scope of the statute and rules relating to declaratory judgments. General Statute §52-29; Practice Book § 277; *Hill* v. *Wright*, 128 Conn. 12, 15, 20 A.2d 388; Maltbie, Conn. App. Proc. § 227; see *Glens Falls Ins. Co.* v. *Somers*, 146 Conn. 708, 713, A.2d . If the rights and jural relations of parties in the situation of these plaintiffs have been conclusively determined by previous decision of this court, the demurrers were properly sustained upon the grounds stated.

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[1] Sec. 53-32. *Use of drugs or instruments to prevent conception.* "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Sec. 54-196. *Accessories.* "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Twice in the recent past this court has passed upon questions of interpretation and constitutionality of what are presently §§ 53-32 and 54-196. *State* v. *Nelson*, 126 Conn. 412, 11 A.2d 856, decided March 6, 1940, held that there was no ambiguity in the wording of the statutes which made the legislative intent uncertain so as to permit a construction which allowed an exception in favor of a duly licensed physician who prescribes the use of contraceptive measures to a patient who is a married woman when, in his professional opinion, her general health and well-being necessitate it. We said (p. 417): "Any intention on the part of the Legislature to allow [the exception claimed] is negatived not only by the absolute language used originally and preserved ever since but also, signally, by [the legislature's] repeated and recent refusals to inject an exception." We held, also (p. 422), that the statute was a valid exercise of the police power. We pointed out (p. 418) that the particular facts alleged in the information confined the issues to situations where, in the opinion of the physician, " 'the general health' of a married woman requires the use of contraceptives." We said that there was, therefore, "no occasion to determine whether an implied exception might be recognized when 'pregnancy would jeopardize life' . . . similar to that usually expressly made in statutes concerning abortion." See General Statutes §53-29.

In *Tileston* v. *Ullman*, 129 Conn. 84, 26 A.2d 582, decided May 22, 1942, the plaintiff, a licensed physician, brought an action for a declaratory judgment to determine whether the statutes forbade him from prescribing the use of contraceptives for a married woman in cases where a pregnancy would endanger her life or health and, if the statutes did, whether they were constitutional. This presented the issue which we specifically said was not before us in the *Nelson* case. We held in the *Tileston* case that, in the light of the legislative history of the statutes and the repeated and recent refusals of the legislature to inject any exception, the statutes could not be construed to allow the exception claimed, and that they were constitutional.

It is claimed that the facts in the cases at bar present an entirely different situation with respect to the rights of the plaintiffs from that presented in the *Nelson* and *Tileston* cases. In Buxton v. Ullman, the complaint alleges, in substance, and the demurrer admits, thatt he plaintiff, a licensed physician, has a patient, Jane Doe, a married woman twenty-five years of age, living with her husband. She had been admitted to the obstetrical service of the hospital where the plaintiff, an eminently qualified obstetrician and gynecologist, was in charge. She was three and one-half months pregnant and developed a condition which brought her to the very brink of death. Her physical condition is now such that conception and another pregnancy would be exceedingly dangerous to her life. She needs and requires advice as to what preventive measures can be taken to avert a recurrence of the experience she suffered. She claims a right to live a normal married life with her husband. She has asked the plaintiff for medical advice, and he has knowledge of drugs, medicinal articles and instruments which could be used by her to prevent conception and avoid the serious consequences of another pregnancy. In a companion case, Doe v. Ullman, the plaintiff is the patient described in the Buxton case, and she alleges, in substance, the same facts as are alleged in the Buxton complaint. In another companion case the complaint alleges, in substance, that the plaintiffs, Paul and Pauline Poe, are a married couple who have consulted Dr. Buxton. Mrs. Poe, who is twenty-six years old and living with her husband, has borne three abnormal children, no one of whom lived more than ten weeks. The basic cause of these abnormalities is thought by Dr. Buxton and other qualified medical specialists to be genetic, but the prognosis is very uncertain and renders the prospect of another pregnancy extremely disturbing to both Mr. and Mrs. Poe. In still another case the plaintiffs, Harold and Hanna Hoe, aged twenty-nine and twenty-six years, respectively, husband and wife, have no living children. Mrs. Hoe has been delivered of four children. Owing to the blood groupings of these plaintiffs, Mrs. Hoe's blood being Rh negative and Mr.

Hoe's Rh positive, the prospects that they can procreate a normal child is highly unlikely.

The plaintiff Buxton has knowledge of drugs, medicinal articles and instrumentalities which could be safely used to prevent conception and avert the dire consequences which have followed conception and pregnancy in the women plaintiffs, who desire to live normal married lives with their husbands. If the plaintiff Buxton, on one hand, applies this knowledge by advising these married people as to available contraceptive measures, and if, on the other hand, these married people accept and follow his advice, the statutes would be violated by all the plaintiffs. It is conceded by the demurrers that the use of contraceptives is, according to medical science, the best and safest preventive measure for the plaintiffs to follow in order to avoid pregnancy.

The plaintiffs claim that these facts raise issues not raised in the *Nelson* and *Tileston* cases. The plaintiff Buxton asserts that he has a constitutional right, distinct from that of his patients to practice his profession free from unreasonable restraint and to advise and prescribe the use of drugs, medicinal articles and instrumentalities which he believes it to be his professional obligation to prescribe. The facts in the Buxton case differ from those in the *Tileston* case in that here the plaintiff, a physician, is asserting an alleged constitutional right of his own rather than an alleged constitutional right of a patient. Essentially, there is no real difference in the nature of the right. The effect of regulation of a business or profession is to curtail the activities of both the dispenser and the user of goods or services. Both are deprived of some advantage which they might otherwise have. The Doe, Poe and Hoe cases differ from the *Nelson* and *Tileston* cases in that the plaintiffs here are asserting their rights, as patients, to the benefit of a physician's prescription for the use of contraceptives which would relieve them of a dangerous threat to their health and happiness. Their right, too, is essentially the same as that of the physician. In other words, the difference between the *Tileston* and *Nelson* cases and those at bar lies only in the fact

that here each plaintiff is asserting his own constitutional right, while in the *Nelson* and *Tileston* cases the doctors were attempting to assert the right of their patients to receive treatment.

It cannot be questioned that the "state may 'regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote . . . the common good.'" *State* v. *Vachon*, 140 Conn. 478, 481, 101 A.2d 509, quoting from *House* v. *Mayes*, 219 U. S. 270, 282, 31 S. Ct. 234, 55 L. Ed. 213. The exercise of this power is always "subject, in the courts, to the test whether it serves the public health, safety and morals at all and whether it does so in a reasonable manner." *Amsel* v. *Brooks*, 141 Conn. 288, 294, 106 A.2d 152. In our tripartite system of government, the judiciary accords to the legislature the right to determine in the first instance what is the nature and extent of the danger to the public health, safety, morals and welfare and what are the measures best calculated to meet the threat. Courts interfere with legislation enacted under the police power only when it clearly appears that the legislative measures taken do not serve the public health, safety, morals or welfare or that they deny or interfere with private rights unreasonably. *Clark* v. *Town Council*, 145 Conn. 476, 482, 144 A.2d 327; *State* v. *Gordon*, 143 Conn. 698, 703, 125 A.2d 477; *Cyphers* v. *Allyn*, 142 Conn. 699, 705, 118 A.2d 318. It was out of respect for these fundamental principles that this court in the *Nelson* and *Tileston* cases refused to so interpret the statutes as to allow an exception to cover situations of the kind presented in the cases at bar and upheld the constitutionality of the statutes.

If the plaintiffs are correct in their claims, we would be required to follow one of two courses: overrule the *Nelson* and *Tileston* decisions by construing the statutes to include the exception proposed in those cases and thus permit physicians to prescribe, and patients to use, contraceptive measures under circumstances similar to those present in the cases at bar, and by that means sustain the constitutionality of the statutes; or hold that the statute with-

out the claimed exception are unconstitutional. Since the *Tileston* decision in 1942, the General Assembly has consistently refused to amend the statutes so as to allow physicians to prescribe the use of contraceptive measures.[2] Furthermore, two complete revisions of the general statutes have been approved by the General Assembly and the statutes in question have been left unchanged. Rev. 1949, §§8568, 8875; Rev. 1958, §§53-32, 54-196. The legis-

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[2]1943 Sess. H.B. 313. *An act to establish standards for contraceptive devices and their distribution* (blank bill). Referred to committee, H. Jour. p. 194, S. Jour. p. 209; committee recommended rejection and passage of substitute, H. Jour. p. 1299; House passed substitute, H. Jour. p. 1339; Senate rejected, S. Jour. p. 1313; House adhered to former action, H. Jour. p. 1480.

1945 Sess. H.B. 317. *An act concerning the rights of physicians to prescribe for their patients* (providing for permitting of physicians to prescribe methods or means for the temporary prevention of pregnancy when necessary to save life or prevent serious injury to health). Referred to committee, H. Jour. p. 263, S. Jour. p. 257; hearing held on May 1, but bill not reported thereafter.

1947 Sess. H.B. 953. *An act concerning the rights of physicians to prescribe for their patients* (providing that physicians may prescribe for the temporary prevention of pregnancy when in the opinion of the physician, pregnancy would endanger the life or injure the health of a married woman). After receiving a favorable committee report, House passed, H. Jour. p. 733; Senate rejected, S. Jour. p. 752; House adhered to former action, H. Jour. p. 808.

1949 Sess. H.B. 1210. *An act concerning the right of licensed physicians to prescribe for married women* (providing for physicians to prescribe for the health of married women). Referred to committee, H. Jour. p. 307, S. Jour. p. 368; hearing held April 12 and May 3 (executive session) but no indication of a further report.

1951 Sess. H.B. 1483. *An act concerning the right of licensed physicians to prescribe for married women* (providing for physicians to prescribe methods or means for temporary prevention of pregnancy in a married woman when pregnancy would endanger the life or injure the health of such married woman). Referred to committee, H. Jour. p. 273, S. Jour. p. 266; hearing held April 11; bill withdrawn.

lature is presumed to be aware of the interpretation placed upon its legislation by the courts and the effect which its own nonaction thereafter may have. *Herald Publishing Co. v. Bill*, 142 Conn. 53, 63, 111 A.2d 4; *Hurlbutt v. Hathaway*, 139 Conn. 258, 263, 93 A.2d 161. Courts cannot, by the process of construction, abrogate a clear expression of legislative intent, especially when, as here, unambiguous language is fortified by the refusal of the legislature, in the light of judicial interpretation, to change it. *Watrous v. Connelly*, 141 Conn. 257, 263, 105 A.2d 654; *Herald Publishing Co. v. Bill*, supra; *Pennsylvania R. Co. v. International Coal*

S.B. 696. *An act concerning the right of licensed physicians to prescribe for married women* (providing for birth control). Referred to committee, S. Jour. p. 192, H. Jour. p. 304; hearing held April 11, but bill not reported thereafter.

H.B. 1485. (Same title and content as H.B. 483). After reference to committee by both House and Senate, House passed, H. Jour. p. 717; bill not reported from Senate committee.

1953 Sess. H.B. 1452. *An act amending an act concerning the right of licensed physicians to prescribe for married women.* After referral to committee by both the House and Senate, and after a petition was filed to get the bill out of committee, a favorable report was made. House passed, H. Jour. p. 1024; Senate recommitted, S. Jour. p. 942; no report thereafter.

1955 Sess. H.B. 1177. *An act concerning the use of drugs or instruments to prevent conception* (providing for the removal of the prohibition on physicians in the prescribing of the use of contraceptives). House passed, H. Jour. p. 949; Senate rejected, S. Jour. p. 1054.

H.B. 1182. *An act concerning the right of licensed physicians to prescribe for married women* (providing for the permitting of licensed physicians to prescribe and others to use and sell contraceptive devices). House passed, H. Jour. p. 954; Senate rejected, S. Jour. p. 1054.

1957 Sess. H.B. 572. *An act concerning the dissemination of information concerning and prescription of contraceptives to married women.* House passed, H. Jour. p. 944; Senate rejected, S. Jour. p. 867.

1959 Sess. H.B. 3497. *An act concerning prevention of conception pursuant to spiritual or medical advice.* Referred to committee, H. Jour. p. 276, S. Jour. p. 292; hearing held April 24, but bill not reported thereafter.

Mining Co., 230 U. S. 184, 198, 33 S. Ct. 893, 57 L. Ed. 1440. In short, courts cannot write legislation by judicial decree, this is particularly so when the legislature has refused to rewrite the existing legislation. The *Nelson* and *Tileston* decisions cannot be overruled by any attempt to reconstruct the statutes.

Since the injection of an exception by construction is legally impossible, can we now hold that the statutes are unconstitutional by reason of the facts in the instant cases, the claims of infringement of constitutional rights are presented more dramatically than they have ever been before. Basically, the claims are, nevertheless, essentially the same as those which this court considered in the *Nelson* and *Tileston* cases. It may well be that the use of contraceptives is indicated as the best and safest preventive measure which medical science can offer these plaintiffs. That fact does not make it absolutely necessary for the legislature to accept such a solution in all cases, where there is, as pointed out in the *Tileston* case (p. 92), another alternative, abstinence from sexual intercourse. We cannot say that the legislature, in weighing the considerations for and against an exception legalizing contraceptive measures in cases such as the ones before us, could not reasonably conclude that, despite the occasional hardship which might result, the greater good would be served by leaving the statutes as they are.

The plaintiff's argument raises an issue of public policy. Each of the separate magistracies of our government owes to the others a duty not to trespass upon the lawful domain of the others. The judiciary has a duty to test legislative action by constitutional principles, but it cannot, in that process, usurp the power of the legislature. *State* v. *Gilletto*, 98 Conn. 702, 714, 120 A. 367; *Lyman* v. *Adorno*, 133 Conn. 511, 513, 52 A.2d 702; *General Motors Corporation* v. *Maquin*, 134 Conn. 118, 132, 55 A.2d 752; *State ex rel. Higgins* v. *Civil Service Commission*, 130 Conn. 102, 111, 90 A.2d 862; *Herald Publishing Co.* v. *Bill*, supra. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly,

that will should be recognized and obeyed." *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 351, 57 S. Ct. 452, 81 L. Ed. 685, quoting from *Johnson* v. *United States*, 163 Fed. 30, 32; *United States* v. *Cooper Corporation*, 312 U. S. 600, 606, 61 S. Ct. 742, 85 L. Ed. 1071; *Helvering* v. *Wood*, 309 U. S. 344, 347, 60 S. Ct. 551, 84 L. Ed. 796; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394, 60 S. Ct. 907, 84 L. Ed. 1263; *Butterworth* v. *Boyd*, 12 Cal. 2d 140, 146, 82 P.2d 434; *Collision* v. *State ex. rel. Green*, 39 Del. 460, 486, 2 A.2d 97; *McDonald* v. *Eagle Coal Co.*, 99 Mont. 309, 314, 43 P.2d 655; *Brahmey* v. *Rollins*, 87 N. H. 290, 298, 179 A. 186. We conclude that §§ 53-52 and 54-196 are a constitutional exercise of legislative power.

Although this disposes of the case, we note the claim of the defendant that in the Doe, Hoe and Poe cases the plaintiffs are obviously fictitious persons and it must necessarily follow that the questions sought to be adjudicated are academic and do not apply to any real person or persons. General Statutes § 52-89 provides, in part, that writs in civil actions shall describe the parties, presumably by their real names, so that they may be identified. Practice Book § 109 states, among other things, that "[i]n the captions of pleas, answers, etc., the parties may be described as John Doe v. Richard Roe et al., but this will not be sufficient in a judgment file which must give all the data necessary for use in drawing the execution." Because of the intimate and distressing details alleged in these complaints, it is understandable that the parties who are allegedly medical patients would wish to be anonymous. To obviate any possibility that the parties and the issues raised are fictitious and that the jurisdiction of the court is being invoked to decide moot questions, a plaintiff who desires to use a name other than his own should, before the case is presented in court, acquaint the court of his desires, establish the fact that the parties and issues are real although the names are fictitious, and secure the court's consent, as was done in these cases. The privilege of using fictitious names in actions should be

granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.

There is no error.

In this opinion the other judges concurred.

At a Supreme Court of Errors Held at Hartford on the First Tuesday of October, A. D. 1959.

Present, Hon. Raymond E. Baldwin, Chief Justice

Hon. John Hamilton King
Hon. James E. Murphy
Hon. Samuel Mellitz
Hon. William J. Shea
Associate Judges

Paul Poe and Pauline Poe, of the Town and County of New Haven, State of Connecticut

vs.

Abraham S. Ullman, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven

On Appeal from the Superior Court for New Haven County at New Haven.

JUDGMENT.

This appeal by the plaintiffs claiming error in the process, record and judgment, and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts, on file in this court, was allowed by the Superior Court for New Haven County at New Haven, on the 11th day of February, A. D. 1959, and came to this court, at its term held at Hartford, on the first Tuesday in March, A. D. 1959, and thence by continuance

to the present term, when the parties appeared and were fully heard.

And now this court finds that in the record, judgment and proceedings of said Superior Court for New Haven County at New Haven, there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the

appellee recover of the appellants his costs taxed at $87.20.

Date of judgment, December 8, 1959.

By the Court,
EDWARD HORWITZ, Clerk.

At a Supreme Court of Errors Held at Hartford on the First Tuesday of October, A. D. 1959.

Present, HON. RAYMOND E. BALDWIN, Chief Justice.

HON. JOHN HAMILTON KING
HON. JAMES E. MURPHY
HON. SAMUEL MELLITZ
HON. WILLIAM J. SHEA
} Associate Judges.

JANE DOE, of the Town and County of New Haven, State of Connecticut
vs.
ABRAHAM S. ULLMAN, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney, in and for the County of New Haven.
} On Appeal from the Superior Court for New Haven County at New Haven.

JUDGMENT.

This appeal by the plaintiff claiming error in the process, record and judgment, and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in

the certified transcript of record and finding of facts, on file in this court, was allowed by the Superior Court for New Haven County at New Haven, on the 11th day of February, A. D. 1959, and came to this court, at its term held at Hartford, on the first Tuesday in March, A. D. 1959, and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this court finds that in the record, judgment and proceedings of said Superior Court for New Haven County at New Haven, there is no error.

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appellee recover of the appellant his costs taxed at $87.20.

Date of judgment, December 8, 1959.

By the Court,

EDWARD HORWITZ, Clerk.

In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 60

PAUL POE ET AL. *Appellants*

vs.

ABRAHAM ULLMAN, STATE'S ATTORNEY *Appellee*

JANE DOE *Appellant*

vs.

ABRAHAM ULLMAN, STATE'S ATTORNEY *Appellee*

No. 61

C. LEE BUXTON *Appellant*

vs.

ABRAHAM ULLMAN, STATE'S ATTORNEY *Appellee*

On Appeal from the Supreme Court of Errors of Connecticut

BRIEF FOR APPELLANTS

FOWLER V. HARPER,
127 Wall Street,
New Haven, Conn.
Attorney for Appellants.

THE WHAPLES-BULLIS CO., NEW HAVEN, CONNECTICUT

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In the

Supreme Court of the United States

OCTOBER TERM, 1960

No. 60

PAUL POE ET AL.

Appellants

vs.

ABRAHAM ULLMAN, STATE'S ATTORNEY

Appellee

JANE DOE

Appellant

vs.

ABRAHAM ULLMAN, STATE'S ATTORNEY

Appellee

No. 61

C. LEE BUXTON

Appellant

vs.

ABRAHAM ULLMAN, STATE'S ATTORNEY

Appellee

OPINION BELOW

The opinion of the Supreme Court of Errors of Connecticut rendered December 8th, 1959, is reported in 147 Conn. 48, 156 A. 2d 508. (R. p. 25)

JURISDICTION

All appellants filed their writs and complaints in the Superior Court of New Haven County, Connecticut, on May 22, 1958, pursuant to Section 52-29 General Statutes of Connecticut, Revision of 1958. The complaints sought a declaratory judgment that Sections 54-196 and 53-32 of the General Statutes of Connecticut, Revision of 1958, are unconstitutional on their face or as applied to them. (R. pp. 1, 5, 10)

Appellee Ullman filed a demurrer to each of said complaints which was sustained by the Superior Court of New Haven County, Connecticut, in a memorandum decision filed January 5, 1959. Thereafter a motion for judgment after demurrer dismissing each of said actions was sustained by said court in a ruling entered on January 30, 1959. (R. p. 19)

Appellants thereupon filed their appeal to the Supreme Court of Errors of Connecticut on February 11, 1959. (R. p. 23) Thereafter on December 8th, the Supreme Court of Errors of Connecticut affirmed the judgment of the Superior Court. (R. pp. 35, 36, 37)

Notices of appeal to the Supreme Court of the United States were filed with the Supreme Court of Errors of Connecticut on February 19th, 1960. (R. pp. 38, 39, 40)

Each of these causes presents a justiciable issue. The conditions which establish the validity of the declaratory procedure were recently set forth by this Court in *Evers* vs. *Dwyer*, 358 U. S. 202. These cases meet the test. All appellants have standing to sue since their vital interests are threatened. Their liberty, their lives and their health are involved.

There is a real and substantial controversy presented in each case. Appellants Doe and Poes require and seek medical advice with respect to contraceptive devices and their use which they intend to employ to preserve their lives and their physical and emotional

health. They are unable to obtain such advice and to use such contraceptive devices and instruments although appellant Buxton, their physician, desires to prescribe for them, for the sole reason that appellee claims that both the giving of such advice and treatment by their physician as well as the use of such instruments and devices are offenses under Sections 53-32 and 54-196 General Statutes of Connecticut, Revision of 1958, and that he will prosecute (as indeed he has heretofore prosecuted in *State* vs. *Nelson*, 126 Conn. 492) any violation of said statutes. Appellants claim and appellee denies that the said statutes, on their face and as applied to them, violate the Fourteenth Amendment to the Constitution of the United States. Each question was raised and passed upon by the state court.

The questions raised here are not hypothetical nor are they contingent. What appellants Doe and Poes desire and propose to do in order to protect their lives, health and marital happiness is not speculative. It is definite and is clearly in violation of the challenged statutes. Nor is the threat to them vague or conditional. It is actual, specific and immediate—not fanciful, general or remote. The appellee has previously prosecuted such violations and declares that he will prosecute further violations. "Definite rights" appear on the one side and "definite prejudicial interferences" on the other. Appellants do not seek an advisory opinion. As to them, the controversy is all too real. Certainly the facts alleged and admitted "show that there is a substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Evers* vs. *Dwyer*, *supra* at 203, quoting from *Maryland Casualty Co.* vs. *Pacific Coal and Oil Co.*, 312 U. S. 270, 273. Appellant Buxton is in a similar legal situation. He desires to prescribe contraceptives to protect the lives and health, physical and mental of the other appellants but is prevented from doing so because of the threat of prosecution under these laws by appellee Ullman.

All appellants are entitled to have these important constitutional questions settled insofar as their claimed rights are concerned and one of the purposes of the declaratory judgment procedure is to afford a method for such determination without subjecting them to the risk of fine or imprisonment or both and, in the case of appellant Buxton, the loss of his license to practice his profession. Borchard, *Challenging Penal Statutes by Declaratory Actions*, 52 *Yale L. J.* 445.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Errors of Connecticut on appeal is conferred by Title 28, United States Code, Section 1275(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on appeal in these cases. *Nashville C. & St. L. R. Co.* vs. *Wallace*, 288 U. S. 249; *Evers* vs. *Dwyer, supra* at 202; *Butler* vs. *Michigan*, 352 U. S. 380.

QUESTIONS PRESENTED

Whether Section 53-32, the general accessory statute and Section 54-196 of the General Statutes of Connecticut which makes it a criminal offense for any person to "use any drug, medicinal article or instrument for the purpose of preventing conception" are unconstitutional on their face or as applied to all appellants, in that the laws deprive them of life, liberty or property without due process of law contrary to the 14th Amendment of the Constitution of the United States.

STATUTES INVOLVED

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958:

Section 53-32, General Statutes of Connecticut, Revision of 1958:

> "Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument

for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 54-196, General Statutes of Connecticut, Revision of 1958:

"Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

STATEMENT OF THE CASES

Appellant Jane Doe is a housewife who has continuously resided with her husband in New Haven since their marriage in 1954. She is 27 years old and has no living children.

Mrs. Doe was admitted to the obstetrical services of the Grace-New Haven Hospital in January, 1957, with the diagnosis of hypertensive cardio-vascular disease, toxemia of pregnancy Cushing's syndrome. It was determined by physicians in authority to terminate her pregnancy because of her condition. However, on January 28, 1957, before this procedure could be carried out, Mrs. Doe developed a cerebral hemorrhage which produced a partial paralysis. She was completely unconscious for two weeks and acutely ill for nine weeks during which time it was necessary to apply several life saving procedures. The plan to terminate her pregnancy was abandoned and on June 19, 1957, she spontaneously delivered a still born fetus. Mrs. Doe was dismissed from the hospital with the same heart condition, severe paralysis of the right leg, total paralysis of the right arm, residual kidney damage, marked impairment of speech and serious emotional instability. (R. p. 6)

It is the opinion of appellant's physician, Dr. C. Lee Buxton, that another pregnancy would be exceedingly perilous to life.

The appellant needs and requires and has asked her physician for medical advice to prevent further pregnancies. It is the

opinion of said physician that the best and safest medical treatment would be to inform her as to methods of preventing conception by use of medicinal articles and instruments. Appellant has been unable to obtain such advice and to use such medicinal instruments for the sole reason that the appellee, State's Attorney, claims that the giving of such information and the use of such instruments are prohibited by Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958 and that he will prosecute any violation of such statutes.

Appellant Doe claims that said statutes are unconstitutional on their face and, as applied to her in her condition of health, deprive her of constitutional rights under the due process clause of the 14th Amendment to the Constitution of the United States and in her complaint she asked the state court so to declare. Appellee, State's Attorney, demurred to appellant's complaint thereby admitting all of the aforesaid facts as alleged in appellant's complaint. The demurrer was sustained. After final judgment for appellee dismissing the action, and affirmance by the Supreme Court of Errors of Connecticut, appellant appealed to this Court and prays that the judgment of the Connecticut courts be reversed and that the statutes in question be declared unconstitutional.

Appellants Paul and Pauline Poe are husband and wife who live together in New Haven. Mr. Poe is a businessman and Mrs. Poe is a housewife. She is 28 years old; he is 32. They have no living children.

Mrs. Poe has had three consecutive pregnancies, each of which has terminated in the delivery of an infant with multiple congenital abnormalities inconsistent with life. The first infant was delivered in January, 1954 with congenital heart disease and kidney abnormality. It died on the 9th day of life. The second child was born in April, 1955, and was a mongoloid with associated renal and cardiac lesions. It expired within six days. The third child was born in October, 1957, with evidence of cerebral and gastro-intestinal maldevelopment. It perished within ten weeks.

It is the opinion of appellant Buxton that even if these children had survived it is highly unlikely that any of them would have had a normal life. The cause of these abnormalities is thought by appellants' physician and other specialists to be genetic but they have been unable to make a successful prognosis and treatment. Appellants have already suffered great emotional distress as a result of these successive tragedies and another pregnancy would be extremely disturbing to their physical and mental health. (R. p. 2)

In other respects, the case of these appellants is similar to that of appellant Doe.

Appellant Buxton is a registered licensed physician and a specialist in obstetrics and gynecology. He was formerly a professor in these specialties at the Columbia-Presbyterian Medical Center in New York and at present is Professor and Chairman of the Department of Obstetrics and Gynecology at Yale University School of Medicine and the Grace-New Haven Community Hospital. Appellant Buxton was and is the physician of appellants Jane Doe and Pauline Poe and it is his medical opinion that the best and safest treatment for these patients is the prescription by him and use by them of devices or instruments to prevent conception and future pregnancies. However, he is unable to administer such treatment and advice for the sole reason that the appellee, State's Attorney, claims that the giving of such advice and treatment by him and the use of such instruments by his patients are prohibited by Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, and that he will prosecute any violation of such statutes. (R. p. 12)

Appellant Buxton claims that the application of said statutes to him as a practicing physician deprives him of his liberty and his property without due process of law contrary to the 14th Amendment of the Constitution of the United States and in his complaint he asked the state court so to declare. Appellee, State's Attorney, demurred to this appellant's complaint thereby admit-

ting all of the aforesaid facts as alleged in appellant's complaint. After final judgment for appellee and affirmance by the Supreme Court of Errors of Connecticut appellant appealed to this Court and prays that the judgment of the Connecticut courts be reversed and that the statutes in question be declared unconstitutional.

SUMMARY OF ARGUMENT

I

The Connecticut laws prohibit the most effective methods of contraception but permit prescription and use of the most unreliable methods. The overwhelming consensus of medical opinion regard the contraceptive practices prohibited by these laws as the most reliable and most acceptable by patients. Only 1.4% of the profession on the basis of extensive sampling regard the rhythm method as reliable. Only 1.5% of the profession recommend abstinence as a method for preventing pregnancies, and 0.7% recommend withdrawal.

II

The Connecticut laws are not reasonably related to the presumed end. The laws are justified by the court below as within the police power of the state to enact restrictions upon the liberty of spouses and their physicians in the interest of public morality. Presumably the laws are supposed to discourage promiscuity. They do not do so because the forbidden devices to prevent conception are lawful and available to prevent disease. This means that they are available to unmarried persons.

III

The laws are not restricted to their presumed purpose. They prevent married spouses from using effective contraceptive devices in order to prevent unmarried persons from using them or to prevent extramarital relations. They thus come within the rule of *Butler* vs. *Michigan, supra.*

IV

The hardship upon individuals and the injurious social consequences of these laws far outweigh any assumed advantages.

A. As a preventive of illicit relations the laws are ineffective. Insofar as it might be presumed that the legislature regarded the use of the forbidden methods as immoral, it is clear that "contemporary community standards" (*Roth* vs. *United States*, 354 U. S. 476) permit, encourage or require their use.

B. As to the harm to individual freedom and to the social order:

1. The laws invade the privacy of the citizen.

Insofar as the laws require abstinence as an alternative to unwanted children they deprive married people of the benefits of consortium, jeopardize the mental health of the spouses and constitute a threat to family stability.

2. The laws result in children whom their parents do not want. Scientific opinion is that unwanted children are unhappier than planned children and are more likely to become anti-social.

3. Parents not only have a right to plan their family according to health standards and economic conditions, but it is the opinion of huge segments of society that they have a moral, if not indeed a religious obligation to do so.

4. It is the opinion of competent obstetricians that many if not most illegal abortions can be traced to a failure to use effective contraceptive devices.

5. The Connecticut laws are utterly unreasonable because (a) they fly in the face of medical science and (b) they tend to bring about an overpopulated world with all the dangers of famine, political unrest and war.

6. The case of appellants, Poes, illustrates the danger that mentally abnormal and defective children result from these laws.

V

The laws are unreasonable in that they jeopardize the lives and health of appellant Doe who will probably die with another pregnancy and appellants Poes who will suffer great emotional travail with the birth of another mongoloid child. Here again abstinence is no reasonable alternative to such a tragedy.

VI

A serological test for venereal disease is required for the issuance of a marriage license in Connecticut. If spouses are faithful, there will be no occasion for the use of the forbidden devices to prevent disease. Unmarried persons, however, may use them. The laws thus discriminate against law-abiding married persons.

VII

Appellant Buxton is unreasonably deprived of a valuable property right in his profession in that, as a specialist in Obstetrics and Gynecology, he is prevented from utilizing the best scientific methods for protecting the health and lives of his patients. There is no appreciable scientific opinion that the forbidden practices are not indicated as the best method for protecting the life and health of appellants Doe and Poes.

ARGUMENT

Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, on their face and as applied to these appellants constitute an attempt to exercise the police power of the state beyond the limitations prescribed by the 14th Amendment to the Constitution of the United States. They deprive appellants of their lives, liberty or property without due process of law.

POINT I

As to all appellants, these laws are arbitrary and capricious in that they make unlawful the most effective and harmless methods of birth control but permit the prescription and use of the most unreliable and least desirable methods. They prohibit the use of drugs, or devices to prevent conception but permit the use of so-called rhythm method, the douche, *coitus interruptus* and abstinence.

Laws purporting to constitute an exercise of the police power of the state by imposing restrictions on the liberty of the individual fail to comply with the requirement of due process of law if they are arbitrary, capricious or discriminatory. *Nebbia* vs. *New York*, 291 U. S. 502; *West Coast Hotel Co.* vs. *Parrish*, 300 U. S. 379; *Jacobson* vs. *Massachusetts*, 197 U. S. 11; *Bolling* vs. *Sharpe*, 347 U. S. 497.

Neither the judicial defenders of the law nor the champions of the Connecticut statute maintain that spouses may not adopt some measures to prevent conception. There is no group, religious or secular, which forbids sexual relations between man and wife except for the purpose of procreation. All religions approve some method to avoid conception. It comes down to a question of what method. Thus some groups endorse the most effective methods as approved by medical science; others prefer less effective methods, as approved by their theology although not approved by medical science. The reasonableness of the Connecticut statute may thus turn on whether this Court will accept scientific or non-scientific judgments on acceptable methods of protecting the happiness, health and lives of married women and checking the overpopulation of the nation and the world.

The clinical effectiveness of the vaginal diaphragm and condom and their superiority over other methods have been repeatedly demonstrated and generally accepted by the medical profession. Perhaps the best technique for the study of human fertility and

its control was developed by Dr. Raymond Pearl.[1] It involves as a yardstick for measuring the relative effectiveness of contraceptive methods the pregnancy rate per 100 years of exposure. To compute this rate the investigator determines for each married couple in the study the duration of exposure to the risk of pregnancy by deducting the aggregate months of married life during which conception was impossible because of pregnancy, separation, or some similar reason. The months of exposure and pregnancies of all couples under observation who used the same methods are added and the pregnancy rate per 100 years of exposure computed.

In a survey of the clinical effectiveness of contraceptives made by Dr. Christopher Tietze and reported in the Proceedings of the Third International Conference on Planned Parenthood in Bombay, 1952, the following results were obtained. In 204 years of exposure the pregnancy rate was 6 for couples who employed the condom. A similar rate was reported by two other investigators. In 935 years of exposure by couples who used the diaphragm the same rate was reported. The slightly different rate of 7 was reported by another investigator involving 472 years of exposure. As against these, a study in Boston of couples representing 606 years of exposure where the rhythm method was employed reported a rate of 14. 324 years of exposure by couples relying upon the douche produced a rate of 36, and 435 years of exposure by couples practicing *coitus interruptus* disclosed a rate of 38.

In another study Guttmacher, Tietze and Rubin found a failure of contraception in 14% of the cases studied with couples relying on the condom, 17.2% by those employing the diaphragm, and 48.2% by persons employing all other methods.[2]

The most recent study was made by the Office of Population Research of Princeton University under the auspices of the Mil-

[1] *The Natural History of Population*, Oxford University Press (1939).

[2] *Journal of the American Medical Association*, Vol. 140, p 1265 (1949).

bank Memorial Fund. It discloses pregnancy rates per 100 years of exposure for the most widely used methods as follows:[3]

Condom	14
Diaphragm	14
Rhythm	38
Douche	41

So far as abstinence is concerned, as a limitation of births, it should be enough to state that it is common knowledge that for all societies in all ages, it has not worked. It is simply too much to ask a young married couple deeply in love to abstain from marital relations for extended periods of time. Nevertheless, the point is documented in this brief. See Point IV, B, 1.

In addition to being highly undependable, *coitus interruptus* is definitely harmful.[4] To a lesser extent other methods may

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[3]See Tietze, *The Condom as a Contraceptive*, Publication No. 5, National Committee on Maternal Health, p. 36 (1960).

[4]"*Coitus Interruptus* is the most widely used and oldest method of contraception. * * * It is usually responsible for a myriad of psychogenic complaints ranging from pruritus vulvae to backache. This method cannot be used by men suffering from premature ejaculation. It is also capable of producing tension in the male and is not too safe a method. The wife, too, will often develop a variety of anxiety reactions because withdrawal separates the genital organs at a time when the emotional climax is at its height, resulting in feelings of severe frustration. It is the worst possible method of birth control." Kroger and Freed, *Psychosomatic Gynecology*, p. 276 (1951). See also Freud, *Collected Papers*, Vol. 1, pp. 88, 147, 273 (London, 1950).

". . . [O]pponents of contraception have sometimes sought to support their objection, which is fundamentally on the plane of values, by saying that the practice is physically harmful. Medical opinion is now decisively the other way, and is indeed almost unanimous that the harm, if any, is done not by contraception but by continued repression, and by the practice of the so-called 'natural' method of family limitation which is veiled in the decent obscurity of the Latin phrase *coitus interruptus*." Williams, *The Sanctity of Life and the Criminal Law*, p. 46 (1957).

create anxiety because of their fallibility, or by the fact that their effective use depends on the cooperation of the husband.[5]

The psychological effect upon women produced by fear of unwanted pregnancy is well understood by psychiatrists. Actually it need not be regarded as pathologic, but, as has been pointed out by a distinguished scientist, "it can produce the effect of a direct inhibition, particularly if it is obsessively exaggerated, as is often the case."[6]

None of the less satisfactory means of contraception is in fact withheld from the public by the Connecticut statute. It is only the safest, the least anxiety-provoking and most esthetic, the diaphragm and condom, which are effectively interfered with.

It seems clear that while no method of contraception has yet been devised which is foolproof, those depending upon the fickle cooperation of nature are the least reliable.[7]

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[5] "Various personality difficulties can come to men from unwise measures to which they resort because of the problem of too frequent pregnancies at home. The tension of self-enforced continence is one. Conflict and remorse and strain connected with extra-marital relation is far more common. Sometimes serious inferiority states due to substitute procedures are present." Favill, "Scientific Birth Control and Marital Health," *Birth Control Review*, Vol. XXII, No. 2 (1937). See also Crossen, *Diseases of Women*, p. 213 (10th ed., 1953).

[6] Deutsch, *The Psychology of Women*, Vol. II, p. 93 (1945).

[7] "No survey of contraceptive methods would be complete without a warning against reliance on the so-called 'safe period' * * *. This, in spite of the fact that large numbers of cases have been reported where pregnancies have occurred as a result of intercourse at all times in the cycle, not excluding intercourse during menstruation itself. This recommendation [safe period] based on theories of Knaus-Ogino has recently been shown to be thoroughly unsound as a result of the researches of Professor Stieve, M.D. of Berlin in his monograph entitled 'The Influence of the Nervous System on the Structure and Activity of the Sex Organs of Human Beings' based on 30 years intensive work. He has, for good and all, blown the 'safe period' or 'rhythm

Guttmacher, in a poll of 3,381 physicians, found the following results as to patient acceptability, degree of trustworthiness and prescription by them.[8]

Reliability and Acceptability of Methods Prescribed

Method	Percentage of Doctors Indicating Technique As First Choice For Prescription	Reliability	Acceptability
No. of doctors indicating one or more techniques	2,516	2,726	2,739
		Per Cent	
Diaphragm and jelly or cream	69.6	62.1	67.1
Condom	6.5	14.1	9.4
Rhythm	4.7	1.4	4.7
Condom and jelly or cream	3.7	7.7	4.3
Jelly or cream alone	3.5	1.5	6.5
Cervical cap	2.3	1.8	2.2
Abstinence	1.5	8.0	1.2
Douches	2.4	0.8	2.0
Intracervical stem pessary	1.3	2.2	1.4
Foam Powder and Sponge	0.4	0.1	0.2
Suppositories	0.6	0.1	0.8
Withdrawal	0.7	0.3	0.2

period' sky high. Haire, "Methods of Contraception," *Indian Medical Journal*, Vol. 46 (1952).

"The rhythm method for the control of conception is sanctioned by groups which oppose other methods of contraception, because it is 'natural.' It is, to be sure, more natural in the physical relationship of intercourse than the condom, the diaphragm or any of the chemical methods. Psychologically, however, it cannot be said to be as natural as these latter methods because, regardless of the inclination of husband and wife, it dictates the time when intercourse shall take place and limits its frequency by about 50% as compared to the frequency reported among normal married couples." *Janney, Medical Gynecology*, p. 398 (1950). See also Kroeger & Freed, *Psychosomatic Gynecology*, pp. 273 ff. (1951); Holland, *British Obstetric and Gynecological Practice*, pp. 756-757 (1958); Emil Novak and Edmund Novak, *Textbook of Gynecology*, p. 607 (1956).

[8] *Human Fertility*, Vol. 12, No. 1, March, 1947.

Why has this problem tormented people of all societies? The origins of attempts to control fertility are buried in the misty past. Obviously this is something that all cultures have regarded as vital. Many tried infanticide. This solution was particularly difficult for the mother—perhaps, to a lesser degree for the father. Other devices were originated. Some tried magic. It didn't work either. What is one to think of a remedy which requires the wife to swallow 24 fresh tadpoles in two days in the spring to prevent conception for five years?[9] This would be lawful in Connecticut. But the use of a diaphragm, on a physician's prescription is a crime. Is this a situation which reasonable men, in 1960, can tolerate?

POINT II

These laws are unconstitutional on their face and particularly as applied to all these appellants because they are not reasonably related to the evil which they are intended to abate.

There are no legislative findings with respect to the conditions which gave rise to the enactment of this legislation nor as to the purpose thereof. Actually, the statute was enacted in 1879, as a part of a general obscenity law, entitled "An Act to Amend an Act concerning Offenses against Decency, Morality and Humanity." See dissenting opinion in *Tileston* vs. *Ullman*, 129 Conn. 84, 98 Presumably the statute is intended to promote the public welfare by restricting immoral practices. The only specific immoral behavior suggested by the Supreme Court of Errors of Connecticut is the prevention of illicit relations on the theory that the free availability and use of contraceptives would tend to encourage promiscuity. See *State* vs. *Nelson*, *supra* at 425. This argument fails because these laws do not prevent the sale or use of devices for the prevention of disease. See *Commonwealth* vs. *Corbett*, 307 Mass. 7, 29 N.E. (2d) 151; *Commonwealth* vs.

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[9]See *Fagley, The Population Explosion and Christian Responsibility*, pp. 90, 91 (1960).

Werlinsky, 307 Mass. 608, 29 N. E. (2d) 150, cited with apparent approval in *Tileston* vs. *Ullman*, *supra* at 91. Nor are contraceptives subject to seizure by the state. *State* vs. *Certain Contraceptive Materials*, 126 Conn. 428. Due process requires that "the means adopted shall have a real and substantial relation to the object sought to be obtained." *Nebbia* vs. *New York*, *supra* at 525. Since the same devices which prevent the transmission of venereal disease as a result of intercourse also prevent conception, the law does not and cannot accomplish its purpose.

Sec. 1-19, General Statutes of Connecticut declares that all records and files of all departments, agencies and commissions are public records, unless expressly otherwise provided. On September 15, 1954, the State Commissioner of Food and Drugs wrote to the Secretary of the Bridgeport Pharmaceutical Association, in part, as follows:

> "Since diaphragms have such therapeutic and other uses there is no reason why vaginal diaphragms may not be prescribed or ordered by a physician and such order filled by a pharmacist. We have always taken the stand that a pharmacist is entirely within his rights to fill any prescription or order from a physician. Such order may be given orally or in writing."

POINT III

These laws are unconstitutional on their face and particularly as applied to all these appellants because they are not reasonably restricted to the evil they are supposed to avert.

We have contended that the statutes in question are not reasonably related to that evil. Assuming, however, that there is such a relation, the acts are constitutionally vulnerable to another objection. They are not reasonably restricted to that evil. To be sure, some limitations on personal liberty are permissible when necessary to the attainment of a legitimate legislative objective. But the legislature may not curtail constitutionally protected

rights unnecessarily and arbitrarily in order to avert an admitted social evil. It cannot throw the baby out with the bath water.

In the decisions of the Supreme Court of Errors the only specific objective of the Connecticut statutes mentioned is that they will tend to prevent sexual immorality. This can only mean that the legislative purpose in enacting the statutes in question was to prevent meretricious relations between unmarried persons and possibly between married and unmarried persons. There is nothing either in the opinions of the Court of Errors or in the legislative history of the Acts to suggest that there is any intention to prevent the spacing of families by married persons or that such spacing is considered immoral by the legislators.

We here have a situation where the legislature prohibits the most effective methods for family planning and the preservation of health of married persons in order to discourage illicit intercourse. "Surely, this is to burn the house to roast the pig." In *Butler* vs. *Michigan*, 352 U. S. 380, this court held unconstitutional a statute proscribing the sale of printed matter, pictures, etc., "containing obscene, immoral, lewd or lascivious prints, pictures, figures or descriptions tending to incite minors to violent or depraved or immoral acts manifestly tending to the corruption of the morals of youth. . . ."

Although it was conceded that the state might enact legislation to protect children against immoral influences, the sweep of the statute was too broad. It prevented the sale to adults of such publications, although they might not have had a deleterious effect on them. "We have before us," wrote Mr. Justice Frankfurter for a unanimous Court, "legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual now enshrined in the due process clause of the Fourteenth Amendment, that history has attested

as the indispensable conditions for the maintenance and progress of a free society."

It would seem impossible to distinguish the *Butler* case from the situation presented here. In order to discourage illicit sexual relations, spouses are prohibited from planning their families in accordance with their economic conditions and consistent with their physical, psychological and emotional welfare; women are subjected to the hazard of loss of life and health; physicians are prevented from practicing their profession in accordance with approved scientific principles; and clergymen are prohibited from the free practice of their religion. Surely this is an arbitrary curtailment of "those liberties of the individual now enshrined in the due process clause of the Fourteenth Amendment."

Restriction of constitutionally protected rights will not be tolerated when the objective sought by the legislature can be attained by other reasonable means. *Schneider vs. New Jersey*, 308 U. S. 147.

POINT IV

The hardship on appellants Doe and Poes and the injurious social consequences of these laws so far outweigh any fancied or real benefits as to constitute an invasion of life, liberty and property without due process of law.

To determine the constitutionality of measures restricting the personal liberty of the citizen this Court has approved the practice of weighing the supposed evils against which the law is directed, against the hardship on the individual and any adverse social effects which may be expected—in other words, balancing the advantages against the disadvantages likely to result therefrom.

A

What are the advantages? What are the evils which the law is calculated to avert?

1. *Prevention of illicit sexual behavior.*

It is said that the law will tend to prevent illicit relations; that the free utilization of contraceptives will tend to encourage promiscuity. This argument fails because the law does not prevent the sale or use of devices for the prevention of disease. See Point II, *supra*.

2. *Prevention of "immoral" sexual intercourse between spouses.*

It may also be argued that there is something immoral about a man and his wife having sexual intercourse for any purpose in mind other than procreation. Connecticut has a sterilization law[10] as well as the absolute prohibition upon the use of contraceptives. "The two such statutes may be reconciled by a distinction between a contraceptive technique which prevents presumably defective offspring and one which prevents merely those which are undesired by the parties to the sex act. It must be noted that such a distinction could not be based on the proposition that the use of contraceptives is immoral in an absolute sense because wicked or against nature, but solely on the ground that the interests of the state require the unrestricted propagation of all healthy persons engaging in sexual relations."[11] But it is the judgment of competent scientists, based on facts revealed by objective research, that the effective limitation of births all over the world (of which Connecticut is a part) is not only desirable for the health and welfare of individuals but necessary to the survival of the human race. See Point IV, B, 5, *infra*.

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[10]General Statutes of Connecticut, Sec. 17-19, Revision of 1958.
[11]6 *U. of Chi. L. Rev.* pp. 260, 266 (1939).

There is, in fact, nothing in the legislative history nor in the judicial interpretation of the Connecticut statutes to suggest that limitation on the birth of children to married persons is immoral. On the contrary, the fact that use of the rhythm method is not banned, that sterilization[12] and abortion[13] are authorized when medically indicated negative any such interpretation.

But even if it be conceded that the legislature did conclude that intercourse between spouses for the sole purpose of expressing mutual love and affection or that the use of contraceptive devices for some other reason was immoral, it is submitted that the conclusion is constitutionally untenable. Unless morality is to be determined by *a priori* reasoning from preconceived premises, there must be some kind of pragmatic test by which presumed legislative findings are to be appraised. Surely the Constitution, conceived for the guidance and protection of human beings, is not to be interpreted in a vacuum.

This Court has laid down the standard for determining the morality of human behavior in the opinion by Mr. Justice Brennan in *Roth* vs. *United States*, 354 U. S. 476. The obscene character of a publication is to be determined by its appeal to prurient interest, applying "contemporary community standards." The publication or distribution of obscene matter is one form of immoral behavior. No reason is to be perceived why a different standard should be applied as a test for other immoral practices. Indeed, Mr. Justice Holmes anticipated such a test 48 years ago in *Noble State Bank* vs. *Haskell*, 219 U. S. 104, 111: "It [the police power] may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong preponderant opinion to be greatly and immediately necessary to the public welfare." If this standard is applied to the practices of contraception proscribed by the Connecticut statutes, it will be seen

[12]General Statutes of Connecticut, Sec. 17-19, Revision of 1958. See also Sec. 53-33.

[13]Sec. 53-29.

that the overwhelming majority of the community regards them as desirable, decent and moral. Indeed, substantial segments in our society regard them not only consistent with the highest standards of morality but as required by religious faith.

In a recent survey by Freedman, Whelpton and Campbell[14] all population groups "accept the idea of couples deliberately regulating the number and spacing of their children in relation to their needs and resources." Less than 5 per cent expressed unqualified disapproval. Even among Roman Catholic wives only 13 per cent avowed such sentiments. "In our sample," they said (*ibid.* 52) "83 per cent of the fecund couples (those who find that they can have children easily) had adopted contraception; 7 per cent more planned to do so after having one or more children they still wanted. We think that the proportion may actually exceed 90 per cent, because many couples who are indifferent or opposed to contraception in early married life adopt some method when confronted with a rapidly growing family." As to unqualified approval by religious groups, the authors conclude that "most Protestants and a great majority of Jews but a minority of Catholics" take such a position (*ibid.* 54). The Catholic minority, however, was substantial (33 per cent) and the Protestant majority definite (73 per cent).

The results of a recent Gallup poll disclosed that 72 per cent of the persons interviewed believed that contraceptive advice should be available to all who desired it; 14 per cent had no opinion; 14 per cent believed otherwise.[15]

In a survey by the *Harvard Crimson* of Harvard and Radcliffe students, the results showed that only 7 per cent disapproved birth control (no qualification appeared in the question).[16]

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[14] *Scientific American*, April, 1959, pp. 50 ff.

[15] New York *Herald Tribune*, Feb. 18, 1960.

[16] *The Harvard Crimson*, Sept. 5, 1959, p. 17.

The Royal Commission on Population estimated that whereas only 15% of fecund couples before 1910 practiced birth control, between 1940 and 1947 the proportion had risen to 55% and that ultimately the proportion would exceed 70%.[17]

"The more education the wife or husband has, the more likely it is that the couple has used contraception, that they began early in marriage, and that they have planned their pregnancies and avoided more than they wanted. * * * Among fecund couples with wives 35-39, the use of contraception is almost universal if the wives had more than a grade school education—91 to 97 per cent are users. If the wives had only a grade school education, a sizable majority—78 per cent—are users."[18] "The use of appliance methods is very extensive. Approximately 70 per cent of all users have tried such methods."[19]

"But the procreation of children is not the only purpose of marriage. Husbands and wives owe to each other and to the depth and stability of their families the duty to express, in sexual intercourse, the love which they bear and mean to bear to each other. Sexual intercourse is not by any means the only language of earthly love, but it is, in its full and right use, the most intimate and the most revealing; it has the depth of communication signified by the Biblical word so often used for it, 'knowledge'; it is a giving and receiving in the unity of two free spirits which is in itself good (within the marriage bond) and mediates good to those who share it. Therefore it is utterly wrong to urge that, unless children are specifically desired, sexual intercourse is of the nature of sin. It is also wrong to say that

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[17] *Papers of the Royal Commission on Population*, Vol. I, pp. 7-8 (1949).

[18] Freedman, Whelpton and Campbell, *Family Planning, Sterility and Population Growth*, p. 115 (1959).

[19] *Ibid.*, p. 179.

such intercourse ought not to be engaged in except with the willing intention to procreate children."[20]

The Archbishop of Canterbury was quoted recently as follows: "The Church of Rome allows to its members only two kinds of restraint—abstinence and the 'safe period'. * * * But there are other methods, and Christians have every right to consider them and decide how far, in their judgment it is legitimate and seemly to employ them."[21]

The 171st General Assembly of the United Presbyterian Church of the U.S.A. held in June, 1959, in Indianapolis adopted a resolution declaring that the "sexual life" of a christian marriage is "given by God for the benefit of his children and is neither an ethical neutral aspect of human existence nor an evil which needs to be justified by something else, as for example, by the procreation of children."[22] The resolution further declared that the proper use of "medically approved contraceptives may contribute to the spiritual, emotional and economic welfare of the family."

At its 95th Synod in Los Angeles, 1954, the Augustana Lutheran Church unanimously adopted the following resolution:[23]

> "The means which a married pair uses to determine the number and spacing of the births of their children are a matter for them to decide with their own conscience, on the basis of competent medical advice and in a sense of accountability to God."

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[20]Report of the Committee on the Family in Contemporary Society, *The Lambeth Conference*, p. 2.147 (1958) and quoted with approval by the *Mansfield Conference* of the World Council of Churches, April 12-15, 1958, Sec. 23. See New York *Times*, Oct. 7, 1959 and Fagley, *The Population Explosion and Christian Responsibility*, p. 233 (1960).

[21]*Newsweek*, April 4, 1960, p. 72.

[22]*Time Magazine*, June 8, 1959.

[23]*Report of the Ninety-Fifth Synod.* D. Vernon Swanson, ed. Rock Island, pp. 229-232 (1954).

"So long as it causes no harm to those involved, either immediately or over an extended period, none of the methods for controlling the number and spacing of the birth of children has any special moral merit or demerit."

On April 27, 1960, the Clergymen's Advisory Committee of the Planned Parenthood of America, consisting of prominent Protestants and Jews, released a policy statement, in part, as follows:[24]

"Mindful of Constitutional guarantees of religious freedom, we claim every right to the implementation of our beliefs concerning contraception. And we suggest that our view and the opposing one need not continue to collide if three prerequisites are recognized: 1. All programs of contraceptive information, service and research should exempt from participation anyone with ethical objections. 2. Conversely, the objections of some must not be permitted to deprive others of contraceptive assistance which is scientifically authoritative, and which may be required of them when in conscience they believe birth control fulfills the will of God. 3. Physicians, research scientists, clergy, social workers and others connected with such programs must be guaranteed full freedom to exercise their professional skills and responsibility.

"We wish to add one comment in a broader context. God has given us a responsibility toward the earth and ourselves. We are charged to protect and nourish human life. So must we care for the earth and its riches—develop but not exploit.

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[24] New York *Times*, April 27, 1960.

This committee included many of the nation's leading religious leaders among the Protestant and Jewish faiths. Some members: The Rt. Rev. James A. Pike; Dr. Harry Emerson Fosdick; Rabbi Edward Klein; Rev. Dr. Bromley Oxnam; Dr. Clarence E. Pickett; Dr. Reinhold Niebuhr; Rabbi Maurice N. Eisendrath; Dr. Norman Vincent Peale; Dr. Henry P. Van Dusen; Dr. Walter G. Muelder; Rabbi David H. Wice. See, in general on the Protestant position, St. Johns-Stevas, *Birth Control and Public Policy*, p. 39 (1960).

> conserve and not plunder. If the proliferation of humanity creates such an imbalance between numbers of people and resources available to support them that man is left wretched and weak, and the earth is gutted of its wealth beyond replenishment, then we shall have nullified our responsibility, denied God's destiny for us, and failed in our high calling under Him."

The Royal Commission on Population reported in 1949 that "We have received no evidence from any quarter to the effect that family-planning or, as it has been called, voluntary parenthood, is regarded as improper or that a married woman should conceive as often as 'nature' determines. The only evidence on which a doubt on this point might arise is that of representatives of the Roman Catholic Church. . . ."[25]

Although the theological position of the Roman Catholic Church prohibits the practice of contraception by "artificial" means to members of the faith, there is eminent Catholic authority that it is morally wrong to enforce by law this dogma upon persons whose religious and ethical convictions are the other way. Thus, Vernon J. Bourke, a distinguished philosopher has recently written:[26]

> "Are Catholics, living as citizens of a democratic country, justified in seeking government restraint of the dissemination of information on birth-control practices? Before examining this, let us remember that we are talking about a pluralistic society, a society in which there are diverse views on the moral value of birth-control data . . .
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> "Remembering that these conflicts arise because of varying notions of what is morally acceptable, I think we may say three things about them. First, each minority group

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[25] *Report of the Royal Commission on Population*, p. 158 (1949).

[26] "Moral Problems in Censoring," 40 *Marquette L. Rev.* 57, 68 (1956). See also John Courtney Murray, in *Religion in America* (John Cogley, ed.) pp. 32-33 (1959).

has a right, even within a large pluralistic society, to censor *for its own members* the use of media seriously considered harmful for that group. Secondly, one minority group in a pluralistic society does not have a moral right to demand government censoring of the expression of the foregoing sort of information *for members of other groups*, who do not share the same standards . . . ." (Emphasis are the original)

If morally wrong, it is difficult to sustain the validity of these laws as reasonable restrictions upon personal liberty.

An influential Catholic publication, on June 16, 1960, stated editorially:[27]

"* * * Undoubtedly, many non-Catholics believe that they can make use of contraceptive devices without violating any divine law. Moreover, many such persons feel *a positive obligation* to prevent conception of offspring for one reason or another. Obviously, then, laws such as the Connecticut law under discussion try to prevent such persons from acting in a way which their consciences either permit or prescribe.

"We would not say that the state never can pass laws such as this, but that it can be done only for the gravest of reasons and when the acts outlawed are manifestly against the common good. Error has no rights, it is true, but persons—or consciences—in error do.

"*From these considerations, we feel that a Catholic can justifiably favor repeal of the Connecticut and Massachusetts anticontraceptive laws, or breathe happily if they are declared unconstitutional.* . . ." (Emphasis added)

As against these supposed purposes of this legislation the following factors should be balanced:

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[27] *Ave Maria*, weekly organ of the Congregation of the Holy Cross, p. 16.

B.

Harm to Individual and Society.

1. *Invasion of Privacy and the Evils of Abstinence.*

This law is a colossal irrelevancy to any proper concern of the legislature of the State of Connecticut. When the long arm of the law reaches into the bedroom and regulates the most sacred relations between a man and his wife, it is going too far. There must be a limit to the extent to which the moral scruples, of a substantial minority or, for that matter, of a majority, can be enacted into laws which regulate the private sex life of all married people.

> "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of those persons to participate in the ceremony does not interfere with or deny rights of others to do so.
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> . . . The sole conflict is between authority and rights of the individual." Mr. Justice Jackson in *Board of Education* vs. *Barnette*, 319 U. S. 624, 630. *Cf. Public Utilities Comm.* vs. *Pollak*, 343 U. S. 451.

So, too, in the present dispute, the challenged statutes prohibit practices performed in the privacy of the home which affect no person except the spouses who freely indulge them. Those who do not believe in the use of contraceptives are free to follow their conscience and their beliefs. All that is claimed here is the equal right of those who believe otherwise. These spouses want to be let alone in the bedroom. "The right to be let alone," said Mr. Justice Brandeis, "is the most comprehensive of rights and the one most valued by civilized men." (Dissenting in *Olmstead* vs. *United States*, 277 U. S. 438, 478). The notion that a man's home is his castle goes back several centuries in the history of Anglo-American culture. The King may not breach those walls save by judicial approval. If the legislature may prescribe, censor or regulate marital intercourse, what is there left

of the "castle"? These married appellants claim a constitutionally protected right to marital intercourse in the privacy of their homes, by mutual agreement, under medically approved conditions.

For centuries in our law, there has been a "right" to consortium. The common law protects it against invasion by third persons. The question here is, when may the state restrict and limit a "right" prized for centuries so highly and "one most valued by civilized men"? It would seem clear that a justification far more cogent than that inferred from the record in these cases is required by the Fourteenth Amendment.

The harmful effects of abstinence on the individual. It is argued that if spouses do not want or should not have children they should abstain from intercourse. Seventeen years ago, Dr. Karl Menninger wrote: "Clinical experience brings us as psychiatrists to the very definite conclusion that while in the lower animals sexual pleasure is primarily a means to an end, in human beings it is not only a means to an end but also a very important end in itself. With a much more elaborate central nervous system and a far more complicated social environment, the human being no longer reacts as animals do in a simple reflex way to the sensory indications of a reproductive opportunity. The impulse for sexual union travels a long complicated path and becomes entwined as Havelock Ellis says, with all the highest and subtlest human emotions and activities. . . . The thwarting of this means the interference with the harmony of human affection which law, religion and social custom are at such pains to nurture." To the objection that there exist fine and healthy people who are celibate, Menninger answers: "Strictly speaking, [it] is true, but in its inference it is untrue and I regard it as intellectually dishonest to continue to use it to foster hypocrisy, false attitudes and neuroses. Solitary confinement is not *physically* harmful either, but it is harmful to the personality in other respects and everyone knows it, and the same is true of complete continence in the adult, male or female. . . . . Denied [out-

let of sex], the suppressed energies become diffused, distorted, and capable of pathological expression."[28]

Otto Fenichel, writing in 1945,[29] mentions as among the causes of sudden aggravations of neuroses "external frustrations or blockings of instinctual satisfactions hitherto obtainable." He says: "Any frustration in the realm of adult sexuality increases the intensity of the unconscious infantile sexual longings." He quotes Reich as pointing out "that during sexual excitement typical autonomic nervous reactions occur. In normal sexual intercourse these autonomic cathexes become gradually transformed into genital ones, and find a genital outlet in orgasm. If the orgastic function is disturbed, this change does not take place. The autonomic system remains over-charged, and this fact produces anxiety."[30]

Karen Horney discusses sexual activity as relieving neurotic tensions: "How well sexual abstinence may be endured varies with the culture and the individual. In the individual it may depend on several psychic and physical factors. It is easy to understand, however, that an individual who needs sexuality as an outlet for the sake of allaying anxiety will be particularly incapable of enduring any abstinence, even of short duration."[31]

"Suppression of the coital urge directed towards his wife is possible for the intelligent considerate husband aware of a good reason why she should not become pregnant. But the urge is still there, and unless, by appropriate and effective taboos, it can be sublimated into a sexual martyrdom of which few Americans, including all colors and creeds, are capable, it will express itself in any one of the innumerable aberrancies of the primate sex function. . . . To demand prolonged continence as the

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[28]"Psychiatric Aspects of Contraception," *Bulletin of the Menninger Clinic*, Vol. 7, p. 36 (1943).

[29]*The Psychoanalytic Theory of Neuroses*, p. 455 (1945).

[30]*Ibid.*, pp. 187-188.

[31]*The Neurotic Personality of our Times*, pp. 158-159 (1937).

only method of contraception from anyone who is not stoutly bulwarked by the strongest spiritual sanction is to drive that individual to what society has judged criminal, and which, if practiced by any number of those who should prevent pregnancy for shorter or longer periods, for reasons which have been stated, would disrupt our whole moral order."[32]

The Kronhausens, in their recent study of obscenity, say: "* * *. All the clinical evidence indicates that guilt based sexual inhibitions, restrictions and repressions result in perversions of the sexual impulse, general intellectual dulling, sado-masochistic inclinations, unreasonable (paranoid) suspicions, and a long list of neurotic and psychotic defense reactions with unmistakable sexual content and overtones."[33]

The harmful effect of abstinence on family life. Great emphasis is placed, in our culture, on the importance of stable family life. Divorce, broken families, "part-time" parents constitute a serious menace to the social order and to the mental health of the nation. It would appear that any law which jeopardizes family solidarity has a negligible claim to the promotion of the public welfare. Competent scholars point out that freedom of the bedroom is an essential factor in satisfactory marital adjustment.

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[32]Rock, "The Scientific Case Against Rigid Legal Restrictions on Medical Birth-Control Advice," *Clinics*, April, 1943, pp. 1609, 1610.

In a large number of African societies there is a taboo on sexual relations between the mother and father during pregnancy and the nursing period following birth which, in many instances may be prolonged for several years. But in these societies polygyny is accepted as a normal way of life. It seems clear that the long period of abstinence by the father from the mother of his child is a mainstay of the system of plural wives as well as a biological basis for the health of the mother. But such a system obviously would collide with the mores and moral values of our society. See, e.g., Simmons, "Sexual Life, Marriage and Birth Among the Efik," *Africa*, Vol. XXX, No. 2, pp. 153, 157 (April, 1960); Fagley, *The Population Explosion and Christian Responsibility*, pp. 87-88 (1960).

[33]*Pornography and the Law*, p. 267 (1959).

"Normally sexed individuals, living in the intimate daily contacts of married life, find it very difficult to abstain completely from marital relations. Only people who have an unusually high degree of control over their desires, or what is more generally the case, those who have a very low degree of sexual drive are able to refrain from sexual contact with their mates for long periods of time."[34] Moreover, "prolonged continence in married life is physiologically and psychologically undesirable. When two people who love each other and live together in the close intimacies of marriage attempt to avoid sexual relations, it inevitably gives rise to marked physical stresses and emotional strains, which are very likely to lead to serious physical and sexual disharmonies and marital conflicts. A satisfactory sex life is essential for a satisfactory marital union, and not many marriages can long survive the complete repression of the sexual instinct."[35]

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[34]Stone, Hannah and Abraham, *A Marriage Manual*, p. 106 (1953).

[35]That these emotional problems associated with sexual maladjustments and worries about parenthood are the basic causes of many broken families is accepted by many competent scholars. McCormick "Another Field of Preventive Medicine," *Journal of the Indiana State Medical Association*, Vol. 4, March, 1956. pp. 284-6, at 285: "Of the four major causes of divorce, sex, finances, liquor and in-laws, sex is by far the predominating factor, being involved in fully two-thirds of all divorces."

Stokes, *Modern Pattern for Marriage*, p. 23 (1948): "But in our time through recent advances in the control of conception we have won a new freedom of sexual pleasure in marriage. It is entirely beneficial and desirable that married people of our day may, under medical advice, discard the conception worries of their immediate ancestors and enjoy their most intimate relationship with spontaneous, natural freedom, subject to no concern other than the employment of a simple contraceptive technic that is merely a small addition to the wife's routine of personal hygiene."

Schölten, "The Premarital Examination," *Journal of the American Medical Association*, Vol. 168, Nov. 1, 1958, pp. 1171-7, at p. 1172: "While not all divorces or unhappy marriages arise from a sexual basis, a surprisingly high percentage do have their origin in some disagreement at that level."

These facts have been recognized in the law for centuries. As early as 1681 we find it written:[36] "So then, it is not the consent of marriage, as it relateth to the procreation of children that is requisite, for it may consist, though the woman-be far beyond that date; but it is the consent whereby ariseth that conjugal society, which may have the conjunction of bodies as well as of minds, as the general end of the institution of marriage, is the solace and satisfaction of man." The above passage was quoted by Viscount Jowitt, L.C., in *Baxter* vs. *Baxter*, (1948) A.C. 274, 289 with the concluding comment: "I am content to adopt these words as my own."[37] So too, are these appellants.

"The connexion between husband and wife, constitutes the most important, and endearing relation, that subsists between individuals of the human race. This union, when founded on a mutual attachment, and the ardor of youthful passions, is productive of the purest joys and tenderest transports that gladden the heart."[38]

The psychological and emotional interactions of sexual responses are phenomena of special significance in the building of solid family relationships. Sex is certainly not the simple or isolated factor it is sometimes thought to be. Sexual responses are broad and variable. Although there are few scientists today who would claim that sex is invariably the sole determinant of satisfactory adjustments of spouses, there is no school of the behavioral sciences which denies that sex is an important factor in domestic discord.[39]

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[36]Lord Stairs' *Institutions*, Book I, Title 4, par. 6.

[37]In the *Baxter* case a husband sought the annulment of a marriage on the grounds that it had never been consummated. The wife, determined not to have children, had never permitted intercourse to her husband unless he used a condom or sheath. The House of Lords refused to annul the marriage, holding that the procreation of children was not the "principal end" of marriage and that this marriage had been consummated.

[38]Swift's *System of the Laws*, Vol. 1, at page 183 (1795).

[39]See general discussion in Young: *Personality and Problems of Adjustment*, Ch. 17.

2. *The problems of the unwanted child.* Karl Menninger makes much of this.[40]

> "Far more important than the dramatic examples in which the hostility of a mother ruins the life of an unwanted child, are the more general effects of repressed maternal hatred. Where one child reacts to this with an acute mental illness, dozens of children react to it in more subtle ways by developing self-protective barriers against the inner perception of being unwanted. This may show itself in a determined campaign or in a provocative program of attracting attention by offensive behavior and even criminal acts. Still more seriously it may show itself as a constant fear of other people or as a bitter prejudice against individuals or groups through deep-seated, easily evoked hatred for them. The rage of the southern poor white against the Negro suspected of some dereliction is referable to the hate he feels inwardly at having been himself, like the Negro, unwanted. The same is perhaps true in the case of Germans and Jews and in many other situations which give opportunity for the expression of hatred in the denial of the feeling of being rejected. The importance of this factor in the psychology of war is even greater, in my opinion, than the economic factor arising from the increase of population. This is why I say that from the purely scientific point of view, *planned parenthood is an essential element in any program for increased mental health and for human peace and happiness.* The unwanted child becomes the undesirable citizen, the willing cannon-fodder for wars of hate and prejudice. . . ."[41] (Emphasis added)

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[40] *Love Against Hate*, p. 224 (1942).

[41] In Dr. Rainwater's recent book, he recalls the pathetic lament of a thirty-four year old "lower-lower class" woman pregnant with an unwanted fourth child: "I think the amount of children you want is important. I don't think anyone should have more than they really want because they feel kind of hard toward the babies I think, and that's not fair." *And the Poor Get Children*, p. 49 (1960).

Freedman, Whelpton and Campbell found that of the 2,713 married women interviewed, 16 per cent of the most recent pregnancies were unwanted by the wife, husband or both.[42]

"Blessed are the little children" is a beautiful sentiment. As a sociological proposition in today's world it is often a figure of speech and should not be mistaken for a fact. Some children are blessed indeed, but the unwanted child is not one of them.

3. *Planning a healthy family.* Although this Court has declared that the term "liberty" includes, among other things, "the right of individuals to acquire useful knowledge, marry, establish a home and bring up children" *Meyer* vs. *Nebraska*, 262 U. S. 390, 400, many young couples can plan neither their families nor their lives in the face of these Connecticut laws. Consider, for example, a student in a professional school, and his wife a graduate student in the university.[43] They are largely supported by his salary as a part-time instructor in the undergraduate school. They desire to plan their children both as to time and number. A pregnancy at this time would disrupt the wife's education and seriously increase the economic problems of the couple who desire to limit their children to the point where they can give them the advantages of a good home and a good education. Moreover, they are convinced that spacing of their children is essential to the health of the wife. The Gutmacher poll of 3,381 doctors indicated the minimum safe interval, so far as the mother's health,

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See also Coghill, "Emotional Maladjustments from Unplanned Parenthood," *Virginia Medical Monthly*, Vol. 68, p. 682 (1941). Jenkins, "The Significance of Maternal Rejection at Pregnancy for the Future Development of the Child," in Rosen, *Therapeutic Abortion*, p. 269 (1954).

[42] *Family Planning, Sterility and Population Growth*, p. 75, (1959).

[43] The bulletins of Yale University disclose that during the academic year 1958-59, there were 1,372 graduate and professional married students enrolled.

was concerned was twenty-three months between children. This was the average. The following table summarizes the results:[45]

Replies to the Question Concerning the Desirable Interval between the Termination of One Pregnancy and the Beginning of the Next after a Viable Birth

Average Interval	Number of Respondents	Per Cent
Any time	6	0.2
1-3 months	129	3.8
4-6 months	295	8.7
7-9 months	197	5.8
10-12 months	885	26.2
13-18 months	714	21.1
19-24 months	699	20.7
25-36 months	111	3.3
37-48 months	5	0.1
49 months and over	1	0.0
Don't know	23	0.7
Not stated	216	6.3
Total	3,281	99.3

The Connecticut statutes here in question deprive such young people of the liberty assured to them by the 14th Amendment of the Constitution of the United States. Certainly that renascence of ideas which brought a recognition of the importance of the individual should afford protection to young married couples in the management of their family affairs within the framework of the marital relation as it is known in the Christian and Judaic culture of the Western World. It would seem clear that if state legislation made it a criminal offense for any married couple to have, say, more than two children, this Court would strike it down as interfering with rights so deeply rooted in our mores as to be a denial of due process. It is submitted that legislation which prohibits a married couple from limiting the number of their chil-

[45] *Human Fertility*, Vol. 12, No. 1 (March 1947).

dren by the most effective, scientifically approved methods, is no less an invasion of liberty which is intolerable.[45]

It may, indeed, be true that if present population trends continue (see Point IV, B, 5(b)) our society may, for mere survival, be compelled to find constitutional means to restrict the number of births by the most effective means possible. One way calculated to bring about such a tragic situation is to prohibit by law voluntary limitation on the birth of children.

4. *The abortion problem.* It is argued that these laws can be justified as in the interest of public morality. The best scientific opinion is that they contribute to public immorality by the creation of situations leading to illegal abortion. Here again, there is no substantial relation between this legislation and the desired ends. It encourages more evil than it averts.

Because of the absence of satisfactory studies of the subject, a recent conference on abortion in the United States, held at Arden House under the auspices of the Planned Parenthood Federation, was unable to reach any clear conclusion as to the relationship of birth control education to abortion. Many of the experts present, however, felt that their clinical observations justified an impression that the abortion rate could be substantially reduced by more widespread use of contraception. The final statement of the conference on this question was: "It was

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[45] "'Birth by decree!' From a moral point, I think that legislation against the manufacture and sale of contraceptives is just that. I do not think that, as a body-politic, we have the right to force any human being to beat and rear a child against her will. It is an appalling violation of personal dignity and the integrity of the human spirit. * * *" Frohman, 31 *N. Y. U. L. Rev.* 1214, 1216-1217 (1956).

"* * * it would seem that the freedom of sex relations within marriage and the freedom to have children when wanted rank high among the basic personal liberties in our society and their curtailment presents a serious civil liberties issue." Kalven, "A Special Corner of Civil Liberties," 31 *N. Y. U. L. Rev.* 1222, 1228-1229 (1956).

recognized by the Conference participants that no scientific evidence has been developed to support the claim that increased availability of contraceptive services will *clearly* result in a decreased illegal abortion rate. The absence of such evidence, however, does not rule out the theoretical likelihood that it does. Therefore, it would be a constructive step if facilities for obtaining advice on contraception should be extended under medical supervision, to make such advice freely available to all who desire it."[46]

Some more positive statements of opinion on the subject: Dr. Sophia J. Kleegman, Clinical Professor of Obstetrics and Gynecology, N.Y.U. College of Medicine: "Education in conception control, during the premarital and postpartum medical examination, is the most effective step to be advocated for preventing both therapeutic and criminal abortion. . . . Modern methods of family planning, it should be emphasized, would prevent 90-95% of all abortion deaths."[47] Dr. Kleegman also says: "For many years, whenever I was on service, I have interviewed every patient who had a therapeutic abortion. Most of them had been under the care of some health or welfare agency for years. Only one of these had ever been referred to a contraceptive clinic by a social worker. I know, in my private practice, when patients have this medical care when needed, there is a definite reduction in the number of legal or illegal abortions subsequently sought and received." She says that in her private practice she often persuades patients not to seek illegal abortions, promising them birth control instruction later to prevent further unwanted pregnancies. "It is this promise that is the greatest help in persuading many a woman to continue a pregnancy that she would not otherwise carry on."[48]

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[46]Calderone, *Abortion in the United States*, p. 182 (1958).

[47]Kleegman, "Planned Parenthood: Its Influence on Public Health and Family Welfare," in Rosen, *Therapeutic Abortion*, pp. 254, 255 (1954).

[48]Calderone, *op. cit.*, note 46, pp. 111-113.

The late Dr. Abraham Stone, one time Vice-President, Planned Parenthood Federation of America: "I believe that there is a high correlation between the lack of use of contraception and the high incidence of abortion: the more contraception is used, the less abortion there will be. While I do not have the figures here, I know from the more than 140,000 couples that have come to the Margaret Sanger Research Bureau that those who have come early in marriage and obtained competent contraceptive information have had definitely fewer abortions than those who have not used any contraceptive measures at all."[49]

Abortion is widespread in the United States. While there are no good statistics because most abortions must be done secretly outside the law, all agree that abortion presents one of the major medical and social problems in the United States. The Arden House Conference Statement said that it presented a problem in epidemiology "as real and as urgent as did venereal disease three decades ago."[50]

Statistical estimates of the prevalence of abortion in the United States vary greatly. The most startling figures are those of the Institute for Sex Research, reported by Tietze and Martin, who, in a study of 2,723 pregnancies of 1,329 women, found 708 induced abortions (20% of all pregnancies). 93% of these abortions were illegally performed. The authors recognize the limits of their sample, which included only urban, white, generally well-educated women, 15% from the northeastern states, and contained a larger proportion of single women than exist in the population at large. Allowing for the disproportion of single women, they estimate that a valid figure for abortions among *comparable segments* of the population would be 20 to 25% of all pregnancies.[51]

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[49] *Ibid.*, p. 159.

[50] *Ibid.*, p. 181.

[51] Tietze and Martin, "Foetal Deaths, Spontaneous and Induced in the Urban White Population of the United States," *Population Studies*, Vol. XI, No. 2, p. 170, 174 (1957).

In a recent study of 5,000 women, Gebhard, Pomeroy, Martin and Christensen found that among the married women of the group 23% of the pregnancies were terminated because of an induced abortion and among the single women 86% were so terminated. In the entire series, all but 6.8% were criminal abortions.[52]

The report of the Statistical Committee of the Arden House Conference concluded:

"Taking into account the probable trend of the abortion ratio since the interwar period, a plausible estimate of the frequency of induced abortion in the United States could be as low as 200,000 and as high as 1,200,000 per year, depending upon assumptions made as to the incidence of abortion in the total population as compared with the restricted groups for which statistical data are available, and upon the assessment of the direction and magnitude of bias inherent in each series of data. There is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency."[53]

It was agreed that a large proportion of abortions are performed on married women, but statistics again are poor. Kinsey reported that 22% of his sample who had been married had had at least one abortion by the age of 45.[54] (This sample was not identical with the Institute of Sex Research sample discussed above, but similarly included only white women, mostly urban and well-educated.) Kleegman thought that nine-tenths of the criminal abortions in the United States "occur among married women with three or more children."[55] A study reported in the British Medical Journal found 88% of abortions to have been performed

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[52] *Pregnancy, Birth and Abortion*, pp. 54, 93-94, 119, 196 (1958).

[53] Calderone, *op. cit.*, note 46, p. 180.

[54] *Ibid.*, p. 54.

[55] Rosen *op. cit.*, note 47 p. 255.

on married women.[56] Whelpton found a correlation between illegal abortions and the number of previous pregnancies.[57]

Dr. Kleegman quoted Commonwealth Fund statistics as showing deaths from abortion as being highest in the age group between 35 and 39, and "most common among women in their seventh pregnancy, and in descending order of frequency, among women in their sixth and fourth pregnancies."[58]

Because women, who often feel desperately that they must have an abortion, are unable to get it through legitimate medical channels, the bulk of abortions are brought about illegally. During the period between 1950 and 1955, during which time 77 therapeutic abortions were performed in Bellevue Hospital, 3,488 cases of abortion (spontaneous as well as induced) were admitted for care. Of these Dr. Kleegman estimated one-half, or over seventeen hundred, were induced. Even this number, she feels, represents only a fraction of the induced abortions in the population served by Bellevue. "Most of the abortions occurring in the population do not come to the hospital at all. Many of these in early stages of pregnancy do not even seek medical care."[59]

Many women try to induce their own abortions, and may cause themselves great injury in so doing. At the Arden House Conference Dr. Helpern, Chief Medical Examiner in New York City, reported: "We see a number of deaths due to self-induced abortions, some of these involving insertion of various objects, medicinal substances, or injection of fluid into the uterus, or the insertion of corrosive chemicals."[60] Dr. Hellman said: "I am sure

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[56]Reported in Williams, *The Sanctity of Life and the Criminal Law*, footnote, p. 211 (1957).

[57]Whelpton, The Abortion Problem: *Proceedings* of the Conference Held Under the Auspices of the National Committee on Maternal Health (1942), as quoted by Williams, *op. cit.*, footnote no. 2, p. 211.

[58]Rosen, *op. cit.*, note 47, p. 255.

[59]Calderone, *op. cit.*, note 46, pp. 109-110.

[60]*Ibid.*, p. 64.

that those of you who deal with large numbers of patients realize that there are styles in inducing abortions just as there are styles in women's clothes, and we happen to be in the midst of one kind of tablet. Why people should feel that these little tablets induce abortions, I don't know. Although they only cost around ten cents, they are sold to women from a dollar to five dollars per tablet. They are highly poisonous, and when inserted, they produce bleeding and ulceration, sometimes severe hemorrhage, but never abortion."[61] Dr. Hellman reported that in a group of 70 abortions which his hospital found suspicious enough to report to the authorities, three-quarters or more were self-induced.[62] The Sub-Committee on Maternal Welfare of the District of Columbia Medical Society found in a study of deaths from septic abortions in the District that the majority were due to self-induced abortion.[63]

A study of the files of the Kings County Grand Jury in New York is instructive. Bates[64] described "abortion mills" where one or more operators conduct a steady practice of abortions, and "abortion rings" might involve a number of abortionists or mills in a fairly complex organization. Of these the "mills" are the most common. An abortion "mill" usually includes, besides the abortionist, a secretary-receptionist, a business manager who handles relations with the landlord, the police, and persons referring patients; also an assistant who acts as nurse, but is seldom a registered nurse.

Referrals to physician-abortionists usually come through doctors and druggists, but in some cases through former patients and others, such as bell-boys and taxi-drivers, often on a fee-splitting basis.

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[61] *Ibid.*, p. 64.
[62] *Ibid.*, p. 65.
[63] *Ibid.*, p. 65.
[64] Bates, "The Abortion Mill: An Institutional Study," *Journal of Crim. L., Criminology, and Police Science*, Vol. 45, p. 157 (1954).

5. *Science and human life.* These laws unreasonably prohibit the dissemination of information and practices which (a) are approved by the medical profession and (b) are considered by demographers as vitally important for the welfare and even the existence of human society.

(a) *Medical Science.* We are not dealing here with crackpot ideas or practices advocated by a fanatical minority of doctors. Use of contraceptive devices, made unlawful by the Connecticut statute, are accepted by the medical profession as sound medical practice and is endorsed by an overwhelming number of persons in the United States. In a poll taken by a distinguished physician in 1944, it appeared that 97.8 per cent of American doctors expressed approval of contraception as a medical technique.[65] Over twenty years ago the House of Delegates of the American Medical Association adopted a committee report recommending that medical students "be instructed fully concerning fertility and sterility and taught the clinical considerations and therapeutic application of contraceptive methods."[66]

"Control by men and women over the number of their children is one of the first conditions of their own and their community's welfare, and in our view mechanical and chemical methods of contraception have to be accepted as part of the modern means, however imperfect, by which it can be exercised."[67]

The Ministry of Health since 1930 has authorized contraceptive advice to be given in government maternal and child welfare clinics to married women for whom a pregnancy would be detrimental.[68] Many clinics of the Family Planning Association,

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[65] Guttmacher, "Conception Control and the Medical Profession," *Human Fertility*, March, 1947.

[66] *Journal of the American Medical Association*, Vol. 108, p. 2217 (1937).

[67] *Royal Commission on Population Report*, par. 427 (1949).

[68] *Ministry of Health Memorandum*, No. 153, 1930; *Circular* 1208 (1931); *Circular* 1408 (1934); *Circular* 1622 (1937).

a private agency, are conducted on the premises of the local authority or regional hospital boards. Private practitioners may provide contraceptive advice regardless of the existence of medical reasons.[69]

Progress in medical science generally since the enactment of the Connecticut Birth Control Laws in 1879 is well known. This is no less true of knowledge of the medical profession with respect to contraception. "The growth of science also was one of the influences that tended to loosen the taboos surrounding the function of sex and to change accepted notions of what was 'decent' in discussion and conventional behaviour. The change in outlook and attitude opened the way for the spread of knowledge of the means of controlling conception."[70]

Himes writing in 1936 said: "Recent symposia and recent summaries of questionnaires received from medical school staffs show that medical opinion has been tremendously liberalized in the United States in the past decade or two; that we in the United States are now catching up with medical opinion in Western Europe. The change has been nothing less than revolutionary especially in its rapidity . . . a little more courage and devotion to science and less pure obscurantism will take us a long way. Whether the curve of history will be projected into the future now depends on the physicians and on the kind of support they get from the general public and especially from legislatures."[71]

The evidence set forth herein clearly indicates that physicians in the nation have not been lacking in courage and devotion to science. Nor have they wanted for support from the general public. Unfortunately the "curve of history" does not receive the support of the legislature of Connecticut. But what may have

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[69] *Supplement to the British Medical Journal*, Nov. 6, 1954, p. 166.

[70] *Royal Commission on Population Report*, par. 40 (1949).

[71] *Medical History of Contraception*, p. 424 (1936).

been justified in 1879 on the basis of medical knowledge at that time and public opinion as to immorality and obscenity, may well be, and it is submitted, is unreasonable and intolerable today. The Constitution does not change but the times and scientific knowledge do.

"It is of the very nature of a free society to advance in its standards by what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." Mr. Justice Frankfurter, in *Wolf* vs. *Colorado*, 338 U. S. 25, 27. A free society is not a frozen society. Democracy cannot afford laws which stand still in a world moving as fast as ours. Nor, it is believed, was it so intended by the Founding Fathers. Unrestricted fertility may reasonably have been thought desirable even necessary in 1879. But as Aldous Huxley has aptly said, in 1960 it is one of the highest forms of "cosmic immorality."

It is submitted that a medical practice which is so overwhelmingly endorsed by the profession as in the interest of human beings cannot be held to be contrary to the public welfare or inimical to public morality.

(b) *Science of demography.* Demography is an important phase of science and may eventually be as significant for life and death on this planet as nuclear physics and atomic science. Contraception and its relation to population control is the object of study and the subject of advocacy by the most thoughtful of the world's demographers. Belief in birth control is not the erratic notion of the sadist or the depraved. It is in the mainstream of scientific thought.

Some of the problems involved which make this issue and this branch of thought pertinent: the size of the earth's population now and in future years, the relationship of the population to the earth's resources—the "vital balance," the national security as

well as the economic and social well-being of the people of the United States.

World population. The United Nations Demographic Yearbook for 1956[72] estimated the world's population of 1955 at 2,691,000,000. The latest United Nations Study[73] declares that at the present rate of increase, in 600 years there will be standing room only (40 square inches per person) on this earth, and Buxton and Southam[74] estimates that "if the present rate of population increase is maintained * * * in 5000 years the mass of humanity will exceed the mass of the earth itself." It cannot be presumed that any civilized nation ignores the problem presented by these estimates of some of the world's foremost scientists. It would seem that these estimates are as pertinent to the issues before this Court as they are spectacular and frightening. *Brown* vs. *Board of Education*, 347 U. S. 483.

It is not suggested that this Court concern itself with the problems which may face the world in 5000 years, or, for that matter, in 600 years. Indeed, there may be no nation such as ours in existence on either of these dates. However, it may be thought relevant to give consideration to the problems likely to be faced in the next few decades or even in the next century. Our nation has already existed for almost two centuries, and it may be hoped that it is not soon fated for extinction.

World population is a matter of grave concern to this as well as all other members of the family of nations. The United Nations maintains a Population Division with a large staff engaged in continuous demographic research. The United States does not contribute large sums for such staff activities merely from curiosity.

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[72] P. 151.

[73] *The Future Growth of World Population, Population Studies*, No. 28, p. v (1958).

[74] *Human Infertility*, p. 220 (1958).

Studies indicate the present gain of population of the world (net increase of births over deaths) amounts to about 68 thousand human beings every 24 hours. This works out to around 475 thousand per week, 2 million per month, with a total annual gain of 25 million.[75] A United Nations study of 1951[76] suggested that the world's people will increase by 500,000,000 to 1,200,000,000 by 1980 in the absence of wars or other calamities. On this basis, the world population would be between 2,976,000,000 and 3,636,000,000 by 1980.[77]

But these estimates have been abandoned as too low. A later study of the Population Division of the United Nations now places the estimate for 1985 as 4⅓ billion persons and for the year 2000 as between 6 and 7 billion.[78] In the preface of this publication (p. v) it is said: "The growth of world population during the next twenty-five years, therefore, has an importance which transcends economic and social considerations. It is at the very heart of the problem of existence." It should hardly be necessary to argue that Connecticut laws which contribute ever so slightly to the extermination of humanity are unreasonable and unconstitutional.

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[75]Cook, *Human Fertility*, p. 68 (1951).

[76]*The Past and Future Growth of World Population.*

[77]See *Determinates and Consequences of Population Trends*, Population Studies No. 17, p. 161 (1953).

[78]*Population Study No. 28, supra*, p. 73. In the report of the tenth session of the United Nations Population Commission (Economic and Social Council Official Records, Supplement No. 3) (1959), it is said: "The projections indicate that the earth's population, which is now approximately 2,800 million, will be between 3,600 million and 3,900 million in 1975, and, under the above-mentioned assumptions, might be between 4,900 million and 6,900 million by the year 2000. The rate of increase has gradually risen during the last century and a half, to the point where it is now approximately 1.7 per cent per year. This means that during 1959 and 1960 the number of people in the world will increase by about 100 million. If the medium assumption of the projections should hold true, the rate of population growth in the coming years would continue to rise." (p. 2)

People and food. There are already too many people on the earth. One of the great problems of the future will be to create and maintain the "vital balance" between resources and population. This will be particularly difficult in view of the unequal distribution of natural resources and arable land. At the present time more than half the people of the world are underfed, poorly housed, receive little or no modern medical care, and are inadequately educated.[79]

Our own State Department estimates that only one-third of the people in the world get enough to eat and that one-third of the people eat three-fourths of the world's food supply.[80] The Food and Agricultural Organization estimated in 1951 that the number of people in the world on a diet of less than 2200 calories had doubled since prewar days and that the number receiving more than 2800 calories was 22% less than before the war.[81] It seems pretty clear that the world is running behind in the race for existence.

There is considerable variation in the estimates of the experts as to carrying capacity of the earth. They range from less than 3 billion to 16 billion. East in 1928 arrived at a maximum of 5,200,000,000 on the assumption of 13,000,000,000 of acres of arable land and 2.5 acres as the requirement for one person.[82] On the other hand in 1945, Pearson and Harper concluded that the approximate population which can be supported by grain supplies even on the Asian standard of consumption is 2,831,000,000.[83] On the European standard the number is reduced

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[79] *Population Bulletin*, Vol. 13, No. 1, p. 11 published by Population Reference Bureau, Inc., Washington, D. C.—address by George W. Beadle, retiring President of the American Association for Advancement of Science, 1957.

[80] *Food and People*, Department of State Publications, No. 3736 (1950).

[81] *United Nations Food and Agricultural Statistical Yearbook*, 1951, p. 161.

[82] East, *Mankind at the Cross-Roads*, p. 69 (1923).

[83] *The World's Hunger*, p. 69 (1945).

to 2,127,000,000 and to 902,000,000 on the North American standard."[54]

Dr. Toynbee, in a recent broadcast, stated: "The abolition of war, working in combination with the lowering of the death rate through our recent vast improvements in public hygiene, is going to raise, in an acute form, the problem of population. Is mankind going to rid itself of two of its three traditional scourges—war and pestilence—only to be done to death by the third scourge, famine? . . . When we have done all that science can do to increase the world's food supply, the only way left open to us for coping with the continuing increase in population, through the reduction of the death rate, will be to offset this increase by a corresponding reduction in the birth rate."[55]

In *Skinner* vs. *Oklahoma*, 316 U. S. 535, 541, Mr. Justice Douglas said: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." They are, indeed, and so, too, is the limitation of

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[54] *Ibid.*, p. 69.

[55] Quoted by Dr. Fairfield Osborn in *Population Bulletin*, *supra*, note 29 at p. 16, and see the address by Toynbee before the Food and Agricultural Organization of the United Nations in Rome, Nov. 2, 1959, reported in the New York *Times*, Nov. 3, 1959:

"But if mankind is now going to save itself from the casualties formerly inflicted upon it by pestilence and war, it is going to bring on itself the new problems of an inordinate increase in population. Our efforts to reduce the death rate must be paralleled by conscious efforts to keep the birth rate under control; for the resources of this planet, even if scientifically administered and developed and husbanded for the benefits of the whole human family, won't suffice forever to feed a population that is increasing *ad infinitum*.

"Sooner or later, food production will reach its limit. If the population is then still increasing famine alone will execute the role that was played in the past by famine, pestilence and war combined." See also Osborn in *Three Essays on Population*, p. 92 (1960).

the size of families. The best scientific data show that at the present rate of population growth, within a relatively short time, survival will be seriously jeopardized. We are practicing disease and death control with amazing success, but birth control in Connecticut is a criminal offense.

Population as affecting the national defense and economic and social security of the United States. The United States has recognized the explosive nature of this problem in significant ways. The Congress has created several successive agencies to administer foreign economic programs. This country in the past 15 years has spent 70 billion dollars on foreign aid, much of it to increase the standard of living in the underdeveloped nations of the world, and, indeed, in some cases to give succor to nations plagued by famine. It is common knowledge that there are areas in the world where the margin between life and starvation for millions is so slender as to disappear altogether on the failure of a staple crop. Our foreign aid, economic as well as military, is justified by the Executive and legislative branches as vital to our national security. It is hardly necessary to cite instances from history when men hungry for food have been goaded by men hungry for power into agitation, rebellion and foreign war. The population crisis in Japan twice within our generation has led that nation into foreign wars in at least one of which many young citizens of Connecticut lost their lives. A third may possibly be avoided in the future if the United States continues indefinitely to subsidize that nation or if the "vital balance" can be attained and maintained."[2]

[2] "If economic and social gains do not surpass population growth and break this cycle of overpopulation and poverty, the governments of many less developed countries may find it increasingly difficult to maintain the confidence and support of their people. Their position will become even more precarious should there be a serious deterioration in living conditions. Modern techniques in medicine and public health have made it possible for mortality to be sharply reduced in the less developed areas before there has been any really substantial economic improve-

There are now parts of the world where the production of food and consumer goods is not keeping up with population growth. For example, food production in Pakistan has been increased by 20% since the end of World War II, in part the result of the United States aid. But the population of that country has increased so rapidly in the same period that there is 10% less food available per person.[57]

By 1954 food production in Burma had increased by 12% since prewar years, but the population had increased by 23%.[58] In Egypt food production was up 31%, population 42%. In Argentina, food 13%, population 39%. In Indonesia, food 11%, people 20%. In Japan, food 6%, population 26%.[59] The

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ment. If fertility remains at traditionally high levels, however, economics expansion must eventually be achieved or death rates will be forced up again. In the long run, a country can have low death rates with all that they imply in the way of economic and social well-being only if a reasonable balance is maintained between population growth and the available resources. Rapid population growth may prove to be one of the greatest obstacles to economic and social progress and the maintenance of political stability in many of the less developed areas of the world." Department of State, *Intelligence Report*, No. 8057, July 23, 1959 at p. 17. See New York *Times*, Nov. 28, 1959.

Dr. John Rock was quoted recently in the New York *Times* as predicting that unless the birth rate of the world is cut "within a short fifty years, hungry and crowded people will rise in bestial strife." Nov. 6, 1958. To the same effect, see Huxley in *Three Essays on Population*, p. 81 (1960).

[57] Bishop, "Agricultural Production in Asia and the Middle East," *Foreign Agriculture*, Vol. XIX, No. 5, p. 92 (1955). An Associated Press dispatch from Karachi on March 9th, 1960 quoted President Mohammed Ayub Khan as warning his people that the country is annually losing ground in its efforts to raise the standard of living. In eight years Pakistan has changed from a food exporting nation into a large scale importer with a chronic hunger problem. New Haven *Register*, Wednesday, March 9, 1960.

[58] *United Nations Statistical Yearbook*, 1955, pp. 21-35 and p. 81.

prospect, therefore, that a world of 6 or 7 billion people will be adequately fed, clothed, and housed is dim indeed.

The total land area of the globe is 35.7 billion acres.[89] Of this, however, only about 4 billion acres are suitable for the cultivation of food and other organic crops.[90] This divides out to less than two acres per person at present population figures. It has been estimated that a minimum of 2½ acres per person is required for sustenance.[91] Others, including the Food and Agricultural Organization, have estimated that one acre of well-cultivated land in the temperate zones is sufficient.[92] But several million of the 4 billion available acres are not in the temperate zones or mid-latitudes. It seems clear that Walker's conclusion is supported by a heavy preponderance of evidence that man's last hope of balancing the food and people equation is population control.[93] The United States is in a poor position to discharge its responsibility of leadership in the solution of a problem as great as any facing the world when voluntary family limitation in one or more of its great states is unlawful.

The economic and social security of the United States is threatened by the population problem. In October, 1958, the Bureau of the Census reported the population of the nation as 175,000,000. It now exceeds 180,000,000.

Even with its vast agricultural resources, the United States will be in trouble within a few years if the present birth rate continues. Enzler estimates that on the basis of 1941-45 crop yields (these were war years with maximum production), the nation could support 203 million persons on a low cost diet, 167 million on a middle-cost adequate diet, 137 million on a high cost ade-

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[89]Walker & Bollis, *Man and Food: The Lost Equation*, p. 14 (1949). (Foreign Policy Association Headline Series, No. 73).

[90]McDougall, *Food and Population*, p. 554 (1952).

[91]Cook, *supra*, note 75, p. 66.

[92]McDougall, *supra*, note 90, at p. 555.

[93]Huxley, in *Three Essays on Population*, pp. 66-67 (1960).

quate diet.[94] Indeed, we may already be in trouble. Only recently, a report from the richest state disclosed that in its richest city one in every six families is "ill clothed, ill housed, and ill fed."[95]

For some years now demographers have developed a concept of the "economic optimum population." Whelpton concluded that the optimum population of the United States may be as low as 100 million.[96]

In considering the optimum population or, indeed, any aspect of the economic future of the United States, the aging of the population is a factor which must be considered. "The findings of studies reviewed show that the results of aging in its early stages tends to reduce the burden of dependency by cutting down the ratio of children too young to work to the total number of persons in the production age groups. At a later state, the relative number of persons too old to work may increase faster than the relative number of children is reduced, with the result that the ratio of dependents to the economically active population rises. Until recently the aging of the population in most of the highly industrialized countries has been such as to reduce dependency; in consequence, most of them are at present in an advantageous position so far as the ratio of the economically active to dependent age groups is concerned. . . . However, if aging continues their position in this respect will deteriorate. For the percentage of aged dependents will eventually mount much faster than the

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[94] *Can the World Feed Itself?* Catholic Association for International Peace, 1950, p. 12; see also, *Resources for Freedom*, President's Materials Policy Commission, Vol. 5, June 1952, pp. 70-71.

[95] New York *Herald Tribune*, June 30, 1958, news story on report of Governor's Interdepartmental Committee on Low Income; Editorial, "Progress Against Poverty," *Industrial Bulletin*, July 8, 1958, (Publication of the New York State Department of Labor), p. 2.

[96] *Forecasts of the Population of the United States*, 1945-1975, pp. 64-65, (1947).

percentage of children falls. Some countries have already begun to pay the penalty for a sharply rising ratio of dependents to producers."[97]

In 1957 the Department of Health, Education and Welfare estimated that by the year 2050, assuming present fertility rates, the population of the United States would exceed 1 billion human beings.[98] Even with a decline in fertility the number may reach a half billion with approximately 16 per cent sixty-five or more.[99] The cost of old age, survivors, and disability insurance under such circumstances would be staggering. "The important question," it is said[100] "is when a decline [in fertility] will begin and how rapid it will be." It is unlikely to decline under laws such as here involved.

Included in the problem of an imbalance between dependents and the producing portion of the population is the cost of rearing and educating constantly increasing generations of children. Minor problems such as transportation, traffic control in urban areas may be left to the imagination. A recent forecast of the

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[97] *The Determinants and Consequences of Population Trends*, U.N. Population Studies, No. 17, p. 254 (1953).

[98] *Illustrative Population Projections for the United States*, Actuarial Study, No. 46, p. 22 (1957).

". . . At present growth rates, population will double in 40 years.

"The United States has not yet caught up with its 40 million increment in population during the last 15 years. Therefore, how can the prodigious population inflation in store to the end of the century be accommodated without weakening the basic social and economic structure of the nation?

"This growth will create new problems and compound many others now pressing for solution. Unless they are faced and solved now, national development will be stunted by the colossal burdens imposed because of the failure of this generation to prepare for those of the future." *Population Bulletin*, Vol. 16, No. 4, pp. 67-68 (1960).

[99] Actuarial Study, No. 46, *supra*, note 98, p. 23.

[100] *Ibid.*, p. 8.

population in Washington's metropolitan area for the year 2000 exceeds four and a half million.[101]

The Bureau of the Census in 1944 made a study of differential fertility rates in 1910 and 1940. In addition to regional, urban-rural and occupational differentials, other differences in fertility were shown amongst socio-economic and educational classes. Generally, it was shown that for several decades people in better economic circumstances had smaller families than those in lesser circumstances. The study showed that three-quarters of a million women who had homes with a rental value of less than $15. per month had produced a replacement of a million and a third daughters—nearly doubling themselves. However, when rental values rose to $30. per month, or anything above that, reproduction fell below the replacement rate.

In regard to the educational levels, the statistics are even more striking. They show that all women who had gone beyond their third year of high school fell short of their replacement quota, whereas those with one to four years of schooling showed the highest replacement rate. The 37,080 women with no schooling were out-numbered more than three times by the 122,580 women who had graduated from college; the former group bore a total of 125,302 children and the latter only slightly more than that. This means that the uneducated group is nearly doubling itself in each generation; the college graduate group is declining by almost half.[102] These statistics refer only to native white women of native parentage, so that no question arises of submerged racial or immigrant groups. However, the pattern in these groups is similar.

". . . Children in larger families have a lower standard of living than those in smaller families, and even at relatively high

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[101]Summary of Materials presented to Sales Executive Club, Washington, Nov. 18, 1957, by J. P. Pickard, Research Director, Washington Board of Trade.

[102]See Cook, *Human Fertility*, p. 221 (1951).

income levels parents meet a large proportion of the cost of their children by cutting expenditure not only on luxuries but also on necessaries like rent, clothing and food. Savings disappear altogether from the budgets of many families as the number of dependent children increases."[103] The following table illustrates the housing facilities for families of different sizes, as found by the Royal Commission.

Average Number of Rooms Occupied by Families of Different Sizes, England and Wales, 1945

(Social Survey Sample of 11,276 Households)

Number of persons in family	Average No. of rooms per family	Average No. of rooms per person	Proportion of Families with less than 1 room per person (Per cent.)
1	3.00	3.00	0
2	4.01	2.01	1½
3	4.33	1.44	9
4	4.58	1.15	19
5	4.56	0.91	44
6	4.95	0.83	72
7	4.87	0.70	85
8	5.09	0.64	93

Other studies confirm these conditions. The lowest birth rates were encountered in families of wealthy people living in large industrial centers, the group comprising college graduates, the professions, and teachers, the "white collar" class of industrial workers, skilled workmen in industry, and rural land owners employ-

[103] *Royal Commission Report on Population*, p. 138 (1949). On Thursday, November 19, 1959, the American Public Health Association issued a carefully worded statement that "full freedom should be extended to all population groups for the selection and use of such methods for the regulation of family size as are consistent with the creed and mores of the individuals concerned." It declared further that serious public health problems are posed when family size impairs the ability to sustain a healthful way of life. New York *Times*, November 19, 1959.

ing high mechanization in their lives. On the other hand, the large families were found in first generation immigrants, urban families or native stock from the lowest economic and social levels, and rural families of low economic and educational status.[104] Although during the 1940-1950 period there was a higher proportionate increase in fertility rates in direct relation to socio-economic status, and, especially, to educational attainment, fertility rates were still inversely related to these factors.[105] Thompson attributes the decrease in differentials to the spread of knowledge of conception control among the urban and rural socio-economic classes.[106] Until this information is "democratized" and spread throughout all elements of the population, reproduction will continue to be "the specialized function of populations in regions of the least economic opportunity."[107]

In contrast to the above are studies of differential fertility in Stockholm, Sweden, where birth control information long has been available to the lower income classes and this has resulted in a complete reversal of the traditional social differentials, as described above. In terms of economics, fertility was found to be in direct proportion to annual income. Couples having an income of at least 10,000 Swedish kroner in 1920 had a birth rate 50% above the rate for couples with an income of less than 4,000 kroner, but even this last-mentioned group had a birth rate perceptibly higher than that of the working class. Simultaneous division according to both occupation and income demonstrated an inverse relation of fertility to income among the industrial laborers. However, in all other occupational groups the observed

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[104]Smillie, *Preventive Medicine and Public Health*, p. 18 (1957).

[105]Kiser, "Changes in Fertility by Socio-Economic Status During 1940-1950," *Milbank Memorial Fund Quarterly*, XXXIII, No. 4, Oct. 1955, 393 ff.

[106]Thompson, *United States Population Problems*, p. 195, (1953).

[107]Stix and Notestein, *Controlled Fertility*, p. 152.

rates increased with income and showed little consistent variation with occupation. Further, the classification according to education of the husband, fertility was shown to be higher for the more educated than for the less educated classes in Stockholm. At each income level the average number of children per family was shown, without exception, to increase from the lowest to the highest education groups. Thus, the highest intramarital fertility was that of the upper classes, regardless of whether these were defined in terms of occupational, economic, or educational status. These statistics were considered to evidence a reversal in Stockholm of the usual social fertility differentials.[108]

The results of the Stockholm studies would seem to provide an effective argument for improvement of the quality of population through the spread of birth control knowledge. They appear to indicate that where there is voluntary choice, there will be a change from an inverse to a direct relationship between social status and income and fertility. Thus, families with less resources will use contraceptive methods as they become available, and, conversely, those with greater social, economic and educational advantages will desire to have and will have greater numbers of children.

Studies have been carried out on groups of native white couples in Indianapolis to ascertain the social and psychological factors affecting fertility.[109] These investigations suggest motivations for family planning in terms of marital adjustment, socio-economic status, intensity of interest in religion, and activities, and attitudes, on the part of the spouses. Among the findings are those showing that positive rather than negative motives are most strong in family planning. The marital adjusted are more apt to plan fertility than the maladjusted. Positive relationships were shown

[108]Edin and Hutchinson, *Studies in Differential Fertility in Sweden*, (1935).

[109]Pratt and Whelpton, "Social and Psychological Factors Affecting Fertility," *Milbank Memorial Fund Quarterly*, XXXIII, No. 4, 430, 462.

between indices of degree of interest in and liking for children and effectiveness of fertility planning. This is attributed by the investigators to a desire to seek the best interests of children and family.

Regarding the correlations with socio-economic status, the figures are interesting to compare with the Stockholm statistics, above. This study shows that among the groups with highest planning (of number and spacing), there is a direct relation of fertility to socio-economic group. Fertility is relatively low, in the group, but the fertility rates increase rather than decrease with rising socio-economic status.[110] Thus, studies on this controlled group seem to show that in the United States also, among those groups free to choose to plan their families, and who do so, those with the greatest resources and the most to offer their children in terms of material comfort, health, education and economic opportunity, will bring forth children in direct proportion to their ability to provide for them.

Everyone will concede that poverty, slums, undernourishment and underprivilege contribute heavily to the crime rate and particularly to juvenile delinquency. The effect of large families among the low economic and social groups is obvious. After a monumental study of contraception from the earliest times in all cultures, Himes declares that the low income groups will use contraceptive information if it is available to them.[111] "Of course, one of the effects of these laws is that there are no birth control clinics, public or private, in the state of Connecticut. The death sentence was pronounced in *State* vs. *Nelson*, *supra*.

In the process of social advance, until recently, the family has been overlooked or given only a minor place in social policy. On the economic side the most important effect is that for most families the addition of children involves a substantial reduction of the family's standard of living; on the non-economic

[110]*Ibid.*, p. 401.

[111]*Medical History of Contraception*, p. 352 (1936).

side the worst effect is felt by mothers who have shared little, if at all, in the great growth of leisure in modern times; and the over-all effect has been to lower the status of the family in the national life."[112]

What we have here is something like this. On the one hand, every phase of science involved has demonstrated that the public welfare of the world, the nation and every constituent part thereof requires effective control of births by the most effective contraceptive devices and the planning of families for health and for socio-economic reasons. On the other, the *a priori* conclusion that public morality is promoted by these laws and a presumption that the legislature of Connecticut knew what it was doing when it enacted these laws in the interest of the public welfare. In other words in exchange for a dubious presumption, the community loses one of its most important social and economic assets, one which, within a short period, as history measures time, may be the key to survival.

6. These laws create intolerable risks of bringing defective children into the world.

Tragic as the case of the Poes is on this record, that tragedy would be compounded if, by some quirk of nature, a mentally defective offspring should survive for an appreciable period. The suffering of the parents, these appellants, would be of an incalculable dimension; as to those of the child, we can also only speculate.

But society, too, has a deep seated interest here. The state of Connecticut maintains two institutions for mentally retarded children. The average number of patients for the fiscal year 1958-1959 was 3,560.[113] If these children survive and marry, they, in turn, may have physically or mentally defective offspring.

[112] *Royal Commission on Population Report* p. 151 (1949).

[113] *Digest of Connecticut Administrative Reports*, to the Governor, 1958-1959 Vol. XIII.

It is not contended that there is much left of the Lombrosian theory of criminology, nor, for that matter of the "neo-Lombrosian" theory which substitutes the psychopathological type for the physical type. And it may well be, as Coleman has pointed out[114] that "it is not the mental deficiency *per se* but the inability of the child to make adequate school or social adjustments that usually results in his delinquency." In any event, it has been demonstrated that feeble minded groups in the community have an unusually large number of delinquencies.[115]

POINT V

These laws are unconstitutional on their face and as applied to appellants Doe and Poes in that their lives and health are put in jeopardy.

The statutes forbidding them to obtain contraceptive medical advice and to use contraceptive devices constitutes an unreasonable infringement of the liberty of these married people because of the risk to life and health which will result from further pregnancies.

In *Tileston* vs. *Ullman* the Connecticut court said:

> "The claim of the state on this point comes down, then to a consideration whether abstinence from intercourse is a reasonable and practical method of preventing the unfortunate consequences. Certainly it is a sure remedy. Do the frailties of human nature and the uncertainties of human passions render it impracticable? This is a question for the legislature and we cannot say it could not believe that the

[114] *Abnormal Psychology and Modern Life*, p. 477 (1950).

[115] See Shelton and Elinor Glueck, *Predicting Delinquency and Crime*, pp. 86, 95 and tables indicated, (1959); Kennedy, *The Social Adjustment of Morons in a Connecticut Town* (Hartford), Commission to Survey Human Resources in Connecticut (1948); Grigg, "Criminal Behavior of Mentally Retarded Adults," *American Journal of Mental Deficiency*, Vol. 52, p. 370 (1948).

husband and wife would and should refrain when they both know that intercourse would very likely result in a pregnancy which might bring about the death of the wife."

"The legislature is the final forum." 129 Conn. 84, 92.

But the legislature is the final forum only in the choice of reasonable alternatives and the overwhelming verdict of medical science is that abstinence is neither reasonable nor practical because normally sexed persons the age of these plaintiffs cannot abstain for extended periods without the development of anxiety neuroses or the impairment of the marriage relation. See Point IV, B, 1. And, although the Connecticut court mentioned only abstinence as an alternative, there are others. It is submitted, however, that they are all unreasonable.

Sterilization. This is unreasonable because persons such as the appellants Poe may, if adequate diagnosis and treatment are obtained, at some future time be capable of having normal children. But sterilization is irrevocable—like the unwanted child. See p. 34, *infra*.

Abortion. This is unreasonable because if for no other reason, in the case of appellant Doe, the termination of a pregnancy could create as great a risk as the birth of a child. Her physicians abandoned their plan to terminate her last pregnancy for this reason after the cerebral hemorrhage.

Divorce. It can hardly be supposed that any one would seriously contend that a reasonable way for a woman in love with her husband to avoid pregnancy would be to obtain a divorce, assuming that it could be lawfully obtained.

Permitted practices to prevent conception. Practices such as abstinence, the rhythm system, the use of the douche, *coitus interruptus* are all so unreliable that the risk involved is unreasonable for women whose life or health would be imperilled by pregnancy. Moreover, as shown elsewhere in many instances, these practices themselves threaten the mental health of both spouses.

The Guttmacher poll of 3,381 physicians with respect to medical indications for conception control gave the following results:[116]

Number and Per Cent of Physicians Approving Conception Control for the Different Indications

Indication	Number		Per Cent	
	yes	no	yes	no
Cardiac	3,002	379	88.8	11.2
Pulmonary disease	2,925	456	86.5	13.5
Renal disease	2,840	541	84.0	16.0
Nervous and mental disease	2,823	558	83.5	16.5
Great Multiparity	2,691	690	79.6	20.4
Hypertension	2,678	703	79.2	20.8
Diabetes	2,571	810	76.0	24.0
Exopthalmic goitre	2,494	887	73.8	26.2
Prevention of inherited disease or malformations	2,447	934	72.4	27.6
Recent pelvic operation	2,419	962	71.5	28.5
General debility and anemia	2,349	1,032	69.5	30.5
Venereal disease	2,239	1,151	66.0	34.0

It thus seems clear that there are no reasonable alternatives to the use of the forbidden contraceptive devices for a woman whose life and health will be put in jeopardy by another pregnancy. In other words, the laws of the state permit these appellants to try to preserve their lives and health—but by the methods least likely to succeed.

But in cases where life is in jeopardy even a reasonable alternative may not save an otherwise unconstitutional act. Thus in *England* vs. *Louisiana State Board of Medical Examiners*, 259 F. 2d 626, 627, the court said: "Under all the cases we think it is that the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills * * *." Certainly it cannot be contended that a young woman for whom another pregnancy involves a serious threat of death adopts an unreasonable choice of treatment when on her physician's advice, she turns to the forbidden contraceptives.

[116] *Human Fertility*, Vol. 12, No. 1 (March, 1947).

These cases, medically, are the reverse of the situation in *Jacobson* vs. *Massachusetts*, 197 U. S. 11, where this Court, referring to offers of proof, rejected by the Massachusetts courts, said: "Those offers, in the main, seem to have had no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body. What everyone knows, the court must know and therefore the state court judicially knew, as this Court knows, that an opposite theory accords with the common belief and is maintained by high medical authority. 197 U. S. 11, 30.

In *Jacobson* this Court said further: "We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them." So, too, in *Lambert* vs. *Yellowley*, 272 U. S. 581, the Court upheld an Act of Congress limiting the amount of liquor which could be prescribed for medicinal purposes because there was substantial medical authority that spirituous liquor had no medicinal value. ". . . the limitation as to quantity," wrote Mr. Justice Brandeis, "must be taken as embodying an implicit Congressional finding that such liquor had no such medicinal value as gives rise to a need for larger or more frequent prescriptions. Such a finding, in the presence of well known diverging opinions of physicians, cannot be regarded as arbitrary or without a reasonable basis." (272 U. S. 581, 595) Mr. Justice Sutherland, joined by Justices McReynolds, Butler and Stone, dissented because they found no medical opinion to support the limitation on prescriptions.

The situation here is different. There is no appreciable body of "diverging" medical opinion. Insofar as there is any at all, it is negligibly "fractional." These are cases involving life and death. The experience of mankind throughout the ages, supported by the overwhelming opinion of the medical profession, is

that young married couples in love with each other cannot, in the circumstances in which these couples find themselves, save their marriage and their lives by the alternatives available under the law of Connecticut. It is urged that this law is "arbitrary [and] without a reasonable basis."

Under the rationale of *Jacobson*, this law is unconstitutional as applied to these plaintiffs. Mr. Justice Harlan there said:

> "Extreme cases can be readily suggested. . . . It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of health or of his body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied in such a case, or, if it was so intended that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Supra*, at 39.

Under the law of Connecticut as interpreted by the Supreme Court of Errors, these "extreme" cases are included and there is no way by which the medical profession can "protect the health and life of the individual concerned," unless this Court regards itself as "competent to interfere."

Although it may not be true in all societies, certainly human life is among the highest of values in our culture. Even with us, a few stalwart patriots may put the alternatives as liberty or death, but the average citizen prizes his life above his liberty and certainly above his property. It would seem self-evident that life is not to be equated with property in the application of the due process clause of the Constitution. "It cannot be that the Court is more concerned about property losses that are not irremediable than about irretrievable human claims." Mr. Justice Frankfurter, dissenting in *Soleshee* vs. *Balkcom*, 339 U. S. 9, 23. Thus legislation which threatens life will require far more to justify it than that which involves property. A more realistic classifica-

tion would include life with those First Amendment rights which receive the highest protection known to our system of law, the rights to think, speak and freely practice religion.

We do not invoke the phrase "preferred position" of First Amendment guarantees insofar as that phrase may be equated with a presumption of unconstitutionality. We do not argue that there exists such a presumption. At the same time we think it can be maintained, both on the basis of decisions of this Court as well as the language used, that the application of the doctrine of reasonableness to statutes limiting speech and religious practices may produce quite different results than when used in connection with other due process problems. For example, the purpose of keeping the streets clean is insufficient to justify an ordinance prohibiting the distribution of religious literature (*Schneider* vs. *New Jersey*, 308 U. S. 147), although it may be adequate when all that is involved is the distribution of handbills advertising a prize fight or a street carnival. See *Breard* vs. *Alexandria*, 341 U. S. 622.

The standard may well be the same for judging legislation threatening life or making inroads on personal liberty on the one hand and economic freedom on the other. But legislative curtailment of freedom of the market place and the right to acquire and use property may be justified to avert evils which reasonable men would find altogether inadequate in the case of abridgment of speech, the prohibition of the free practice of religion or a serious threat to life itself. In other words, although there may be a presumption of constitutionality of statutes directed at those rights enshrined in the First Amendment and where human life is involved, it is submitted that the burden of overcoming the presumption is far less onerous than in the case of other restrictions. The curtailment in the former situation may be intolerable, whereas reasonable people would regard the price not too high in a situation involving only money.

POINT VI

The Connecticut statutes are unconstitutional on their face, and particularly as applied to appellants Doe and Poes, in that they unreasonably and arbitrarily discriminate against them as married persons.

Presumably *Commonwealth* vs. *Corbett*, 307 Mass. 7 (See *Tileston* vs. *Ullman*, 129 Conn. 84, 91) reflects the law in Connecticut as well as in Massachusetts. See Point II, *infra*. Thus it is not unlawful for a physician to recommend and for persons to use otherwise forbidden devices for the purpose of preventing disease although by so doing they also prevent conception.

The Connecticut law requires a serological test and a certification that parties are free from venereal disease before a marriage certificate can be obtained.[117] When married, presumably the parties are healthy in this respect, and, if they are faithful, will have no occasion to use contraceptives for the prevention of disease. Persons engaged in pre-marital or extra-marital intercourse cannot be expected to have the assurance of a physician's certificate that they will not risk infection—consequently they may employ the devices forbidden to law abiding spouses.

The situation comes to this. The only way married couples may lawfully use contraceptives which unmarried persons may freely employ is for one of them to become exposed to disease by indulging in illicit sexual connection. It is submitted that this is a situation which does not promote public morality.

POINT VII

As to appellant Buxton, these Connecticut laws prohibit him from practicing his profession according to the scientific principles on which it is based and according to his conscience, and

[117] General Statutes of Connecticut, Sec. 46-5 (b), Revision of 1958.

thereby deprives him of liberty and property without due process of law.

That the use of contraceptives is accepted and endorsed by the organized medical profession in this country and by an overwhelming majority of individual physicians, see Point IV, B, 5(a).

Appellant is Professor and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and the Grace-New Haven Community Hospital. As such, it is his duty to teach medical students in the various contraceptive techniques. The law of Connecticut prohibits him from utilizing in his practice the very procedures which he teaches his students to employ. Moreover, he is prevented from giving the medical advice to his patients at the hospital which the profession has demonstrated is in the best interests of their health. In his judgment the use of contraceptives made unlawful by this law is the best method for preserving the life of appellant Jane Doe and the physical and mental health of appellants Poe. The law unreasonably deprives him of his property and his liberty as a physician, sworn by his professional oath to uphold the best tradition of medical science.

This physician has a constitutionally guaranteed right to make a living. The right to work, in Mr. Justice Douglas' words, is "the most precious liberty that man possesses." (Dissenting in *Barsky* vs. *Board of Regents*, 347 U. S. 442, 472.) Not only has he the right to earn a living as a medical practitioner, but he may do so free from "unreasonable and unnecessary restrictions," (Mr. Justice Butler in *Burns Baking Co.* vs. *Bryan*, 264 U. S. 504, 513, and quoted approvingly by Mr. Justice Sutherland in *Liggett Co.* vs. *Baldridge*, 278 U. S. 105, 113). The established doctrine is that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to

some purpose within the competency of the State to effect." *Meyer* vs. *Nebraska*, 262 U. S. 390, 399.

In *Abelson's Inc.* vs. *New Jersey State Board of Optometrists*, 3 N. J. Super. 332, 65, A.2d 644, 648 (Ch. 1949), the court held it was unreasonable to limit the number of branch offices an optometrist could operate as well as to prohibit display of eyeglasses frames and optometrists' diplomas in the window. "While the State's power to regulate those professions which touch or concern the health or welfare of its citizens is clear and long established, that power is none the less subordinate to the rule of reason. It must not be exercised capriciously, arbitrarily or oppressively. The employment of the power must always be reasonably related to legitimate ends sought to be attained." 3 N. J. Super. at 339.

Are the conditions in this case reasonable? This doctor may abort his patient to save her life[118] and he may advise her on methods of preventing conception and death. But he can only advise the most unreliable ones.

It is not denied that the courts presume that a legislature, when it adopts a statute, does indeed have "knowledge of conditions supporting its judgment that the legislation is in the public interest." *Hardware Dealers Mutual Fire Ins. Co.* vs. *Glidden*, 284 U. S. 151. Although the presumption concededly is a heavy one, it is not irrebutable. *Meyer* vs. *Nebraska*, 262 U. S. 390, 400. Now what facts are presented to support the presumption? The record is barren of any legislative findings that this law is in the public interest, that it will contribute to public morality or that it promotes the public health or welfare. All this Court has to go on is the *a priori* judgment that the law prevents illicit intercourse and that the voluntary limitation of the family by scientifically sound devices is not in the public interest. Both judgments are demonstrated to be erroneous.

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[118] General Statutes of Connecticut, Sec. 53-29, Revision of 1958.

Appellant has a property right in his profession. When the state unreasonably deprives him of any valuable attribute of his property, it does so without due process of law. *Buchanan vs. Warley*, 245 U. S. 60. It requires many years of education, training and experience and the outlay of large sums of money to attain the scientific status which he has achieved. In *England vs. Louisiana State Board of Medical Examiners*, 259 F. 2d 626, 627, the court reasoned:

> "Without doubt it is reasonable for the state to outlaw witch doctors, voodoo queens, bee stingers, and various other cults which no reasonably intelligent man would choose for the treatment of his ill, but it would certainly be arbitrary to exclude some, if not all, of the following classes which Louisiana does admit to practice: dentists, osteopaths, nurses, chiropodists, optometrists, pharmacists, and mid-wives. Just where is the dividing line? Under all of the cases, we think it is that the State cannot deny to any individual the right to exercise a reasonable choice in the method of treatment of his ills, *nor the correlative right of practitioners to engage in the practice of a useful profession.*" (Emphasis added)

It is of the essence of the dedicated professions that the physician, as the lawyer, owes his firm allegiance to the person who has placed his physical, mental or legal welfare in his hands. In both cases it is submitted that it is an unreasonable restriction to prohibit scientifically sound procedures on the basis of judgments, unsupported by facts or conditions, that some fanciful balance of public interest will be thereby advanced. The law of Connecticut prohibits this appellant from protecting the physical and mental health of appellants Poe and the life of appellant Jane Doe, but permits him to protect from venereal disease persons engaged in illicit intercourse. It is submitted that it is impossible to identify this law with the general welfare and equally impossible, to find that it is consistent with any acceptable principle of morality.

We have indicated elsewhere that in certain cases proper medical practice today requires knowledge of and prescription by physicians of contraceptive devices. "The proper prescription of birth-control measures is an important and indeed essential aspect of preventive medicine."[119] Physicians must exercise that reasonable judgment and skill possessed by the average member of their class and if they have additional skill and competence they must utilize that which they have. Thus, the medical practitioner "must keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions." *Stone* vs. *Goodman*, 241 A. D. 290, 294, 271 N. Y. S. 500.

Appellant Buxton departs "from approved methods" only under compulsion of Connecticut law. No one would contend that in Connecticut he would be guilty of malpractice in an action for the death from pregnancy of appellant Doe. But if he practiced his profession in any state but Connecticut or Massachusetts, it is submitted that his failure to prescribe an effective contraceptive device would subject him to liability for failing to exercise that reasonable judgment and skill prevailing among obstetricians and gynecologists in the locality. This, it is urged, goes far toward establishing the unreasonable character of the Connecticut statutes which prevent this physician from exercising the skill and judgment which he has and which is unquestionably established in his profession as the norm for all practitioners in his specialty. Failure to adopt appropriate and customary preventive measures, as well as careless diagnosis or improper treatment may constitute malpractice. *Walden* vs. *Jones*, 289 Ky. 395, 158 S. W. (2) 609; *Jordan* vs. *Skinner*, 187 Wash. 617, 60 P. (2) 697.

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[119]Statement by professors of Obstetrics and Gynecology, New York *Times*, Aug. 1, 1958.

CONCLUSION

Appellants contend that, whatever their constitutional status in 1879, these Connecticut laws are utterly beyond the tolerance point of reasonable men in 1960. On the one hand, they accomplish nothing good. On the other, they interfere mercilessly with the most intimate and sacred experiences in life, they are a hazard to the lives and health of married persons, they unreasonably restrict physicians in protecting their patients and they gravely threaten the stability of family life and the social order.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 60

PAUL POE ET AL

Apellants

vs.

ABRAHAM ULLMAN, State's Attorney

Appellee

JANE DOE

Appellant

vs.

ABRAHAM ULLMAN, State's Attorney

Appellee

No. 61

C. LEE BUXTON

Appellant

vs.

ABRAHAM ULLMAN, State's Attorney

Appellee

ON APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

BRIEF FOR APPELLEE

For Appellee:

ALBERT L. COLES,
Attorney General.

RAYMOND J. CANNON,
Assistant Attorney General.

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STATUTES INVOLVED

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Said statutes are quoted in Brief for Appellants, Pages 4 and 5.

STATEMENT OF THE CASES

The Statement of the Cases as contained in Brief for Appellants, Pages 5 through 8, is substantially correct in that such Statement paraphrases the allegations of the three complaints.

The appellants Poe and Doe brought actions seeking a declaratory judgment as to whether Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, are in conflict with the Constitution of the United States as depriving appellants of life and liberty without due process of law. (R.pp. 1-9).

The appellant Buxton also brought an action for declaratory judgment seeking a determination as to whether said statutes were in conflict with the Constitution of the United States as depriving said appellant of property and liberty without due process of law. (R.pp. 10-14).

In said actions the appellants also sought a determination as to whether the statutes in question constituted a valid exercise of the police power of the State as to the facts related in each of said complaints.

To each of the complaints the appellee filed a demurrer. (R.pp. 14, 15). Said demurrers were sustained in the Superior Court and the appellants thereafter appealed to the Supreme Court of Errors of Connecticut, and the Opinion is contained in the Record. (R.pp. 25-34).

SUMMARY OF ARGUMENT

POINT I

The decision of the Connecticut Supreme Court of Errors (R.pp. 25-34) that Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, should be sus-

tained on the ground that said statutes constitute a proper exercise of the police power of the State.

POINT II

The police power as exercised by the State does not deprive either (a) the rights to life and liberty of the appellants, or (b) any property rights of the appellant Buxton without due process of law.

POINT III

Comments concerning certain claims of the appellants as contained in their Brief.

ARGUMENT

POINT I

The appellee at the outset emphasizes the opinion of the Supreme Court of Errors of Connecticut (R.pp. 25-34), and two previous opinions wherein the basic issues now presented were twice considered by the Connecticut Supreme Court of Connecticut. *State v. Nelson*, 126 Conn. 412 (1940) and *Tileston v. Ullman, State's Attorney*, 129 Conn. 84 (1942). In all three cases the statute (Section 53-32, General Statutes, Revision of 1958) was upheld as within the police power of the State and, therefore, constitutional, and further that said statute permitted no exceptions.

The Nelson case involved two physicians and a nurse, namely, Dr. Roger B. Nelson, Dr. William A. Goodrich and Clara L. McTernan. Each of the defendants was arrested and charged with being an accessory to the crime of the use of contraceptive devices under Section 6246 of the General Statutes, Revision of 1930 (now Section 53-32, Revision of 1958).

The Nelson case was argued on a demurrer presenting for all practical purposes the same issues as are now presented in the instant case. The defendants claimed that the statute was unconstitutional because of the breadth of the restriction imposed in that it constituted deprivation of rights and particularly of liberties as protected by Article XIV of the Constitution of the United States. It was alleged that the doctors prescribed contraceptive measures to two married women, which prescription was allegedly necessary to preserve the general health of said married women.

In addition to the legal claims advanced by the defendants practically the same medical and sociological arguments were presented then as is now presented in appellants' brief in the present case. Connecticut Supreme Court Records and Briefs, Part 2, January Term 1940, A-144, Page 286.

The Court in the Nelson case pointed out that an exception to the statute "is negatived not only by the absolute language used originally and preserved ever since but also, signally, by its (Legislature's) repeated and recent refusals to inject an exception. At each session from 1923 to and including 1931 a bill was introduced excepting from the operation of the statute . . . use upon prescription of a physician and sale to physicians or upon their prescription, but in each instance the bill was rejected. In 1933 a bill was introduced making a similar exception but limited to cases in which, in the opinion of the physcian, 'pregnancy would be detrimental to the health of the patient or to the child of such patient'. This was amended in the House of Representatives so as to further limit the exception to married women and passed as amended but was rejected by the Senate. Upon report of a committee of conference the House reconsidered, further amended and passed the bill but no further action was taken in the Senate. In 1935 a bill similar to the original 1933 bill was introduced but not reported out by the judiciary com-

mittee to which it was finally referred. Patently we may not now attribute to the Legislature an accidental or unintentional omission to include the exception contended for by the defendants and necessary to place them outside the operation of the statutes. Rejection by the Legislature of a specific provision is most persuasive that the act should not be construed to include it. *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U.S. 184, 198, 33 Sup. Ct. 893." *State v. Nelson*, supra, 417.

In an exhaustive opinion the Court proceeds to discuss the other issues and concluded that the statute is constitutional and not in violation of the Fourteenth Amendment of the United States Constitution, and that in view of the language of the statute there are no exceptions permitted.

In 1942 our Supreme Court of Errors considered the constitutionality of the statutes in the case of *Tileston v. Ullman, State's Attorney et al*, cited supra. This was an action for a declaratory judgment quite similar to the present proceedings and was presented before the Supreme Court of Errors on a stipulation as to facts. Connecticut Supreme Court Records and Briefs, February Term 1942, A-172, Page 425.

Dr. Tileston petitioned the Court for a judgment declaring whether the designated statutes made it unlawful for him to prescribe the use of contraceptive devices for married women living with their husbands when the doctor in the exercise of his professional judgment was of the opinion that contraceptive measures should be prescribed because future pregnancies would have a serious effect upon the patients' general health and might result in permanent disability.

The Court in its opinion, page 94, stated that when the "legislature expresses the will of the people in a statutory enactment the language of which is plain and unambiguous,

the law must stand unless it is clearly unconstitutional or unless it is plain that the legislature must have intended an exception which it did not express. Birth control is a highly controversial subject. Social thinking is divergent. It finds frequent expression at legislative hearings. Then the legislature speaks. In the statute now under consideration it has infringed upon what a large body of intelligent citizens believe are their natural rights and privileges. The answer is that ' "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority . . . essential to the safety, health, peace, good order and morals of the community." ' The Supreme Court of the United States in *Jacobson v. Massachusetts,* supra, 26. (197 U.S. 11; 25 S.Ct. 358).

"The argument presented to the legislature is moral, physiological, sociological. The questions presented to us in this case are wholly legal . . ."

Tileston v. Ullman, State's Attorney et al, was subsequently appealed to this Court, 318 U.S. 44; 63 S.Ct. 493. The Court dismissed the appeal on the ground that the proceedings of the State Court presented no constitutional questions which appellant had standing to assert, in that his patients were not parties to the proceedings and there was no basis on which the appellant could secure an adjudication of his patients' right to life since they did not assert such claim in their own behalf.

The opinion of the Supreme Court of Errors of Connecticut in the instant case points out that since the Tileston decision in 1942 the Connecticut General Assembly has at every Session refused to amend the statutes so as to allow physicians to prescribe the use of contraceptive measures (R. pp. 30, 31, 32, Note 2).

The Court also mentioned the fact that two complete revisions of the General Statutes have been approved by the General Assembly and that the statutes in question have been left unchanged.

The 1959 Session of the Connecticut General Assembly, in approving the 1958 Revision of the Connecticut statutes, adopted Public Act No. 3, which is as follows:

> "Section 1. The general statutes of the state, as corrected, revised, arranged, incorporated and published under the title, 'General Statutes of Connecticut, Revision of 1958', by the legislative commissioner under the provisions of number 605 of the special acts of 1957, are adopted, ratified, confirmed and enacted.
>
> "Sec. 2. This act shall take effect on January 15, 1959."

The defendant filed demurrers in each of the three cases on the ground that the issues presented by the plaintiffs' complaint had been previously conclusively determined by the Connecticut Supreme Court of Errors (R.p. 14).

The Court in its opinion sustained the demurrers on the ground that the rights and jural relations of the parties in the situation of these plaintiffs had been conclusively determined by previous decisions of this Court (Opinion, R.p. 26).

In the face of the legislative history as noted by the Connecticut Supreme Court of Errors, it is evident that the Connecticut General Assembly was aware of the opposing theories regarding artificial birth control. This being so, the Connecticut Legislature had to make a choice as between two divergent views, and chose not to permit exceptions to the statute as originally enacted in 1879. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed." (Opinion, R.p. 33).

The appellants indicate in their argument that proposed amendments to the statute have been and are being opposed by a minority of the electorate. This is pure assumption and has no basis upon which this Court may rely, particularly in view of the legislative history of Section 53-32.

As indicated in *Tileston v. Ullman*, supra, 87, this statute was originally enacted in 1879. At practically every Session since 1923, opponents of this legislation have attempted to modify this legislation either by repeal or amendments. In each instance the Legisature has refused to make any changes in the statute. Under these circumstances it is inconceivable that successive Legislatures from 1923 through 1959 were not speaking the will of the majority of the citizens of Connecticut.

Statutes forbidding or regulating the sale or advertisement of contraceptives or dissemination of birth control information have uniformly been held to be constitutional. 113 A.L.R. 970.

The purpose of such statutes was clearly stated by the Court in *Commonwealth vs. Allison* (1917) 227 Mass. 57; 116 N.E. 265, at page 266:

> "'Manifestly they are designed to promote the public morals and in a broad sense the public health and safety. Their plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the state and nation a virile and virtuous race of men and women. The subject matter is well within one of the most obvious and necessary branches of the police power of the state . . . It has been argued that these pamphlets were designed to propogate what is termed "birth control". Whatever may be said about that subject, it is too man-

ifest for discussion that prohibition of the acts described in the statutes . . . is within the power of the general court.' "

POINT II

A.

It is claimed that the State in forbidding the use of artificial means to prevent conception thereby deprives married people of personal liberty within the intent of the Fourteenth Amendment of the Constitution of the United States. Liberty within the meaning of the Constitution has not been defined with any great precision. This Court has said that "Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective." *Bolling et al v. Sharpe et al.* 347 U.S. 497; 74 S.Ct. 693 (1954).

It is obvious that the Constitution does not mean that individuals have the right to total liberty for that would mean license and chaos and tend to develop an irresponsible citizenry.

The issue, then, is to what extent may individuals be restrained by legislative enactments. When moral and welfare issues are involved, a State has great latitude, and that a State has direct responsibility over the morals and welfare of its people cannot be seriously questioned. State Legislatures have, in many instances, passed laws in the moral field which result in curtailing the range of conduct permitted to an individual.

As the Connecticut Supreme Court of Errors stated in *State v. Nelson*, supra, 424, "As to a contention that the statute unconstitutionally 'interferes with the free exercise of conscience and the pursuit of happiness' it is noted in *People*

v. Byrne (163 N.Y.S. 682) 687, that a like claim could be made with no more force as to statutes prohibiting adultery, or fornication, or any one of many other crimes."

Some other areas where statutes curtail freedom of conduct are, for example, horse race betting, gambling, lotteries, etc. "Conduct of the individual is subject to such direction and restraint as the public good requires." *State v. Nelson*, supra, 424. Where there are controversial views on such subjects, the public policy of a State is to be determined by the Legislature and not the Courts. *Jacobson v. Commonwealth of Massachusetts*, 25 S.Ct. 358, 197 U.S. 11; *State v. Nelson*, supra; *Tileston v. Ullman*, supra.

The Connecticut Supreme Court of Errors has now considered the issues presented on three different occasions. In addition, there is now pending in the Connecticut Supreme Court of Errors the case of *David M. Trubek, et al v. Abraham S. Ullman, State's Attorney* (Argued October 6, 1960). The plaintiffs are husband and wife, aged 23 years and 21 years respectively, both being students at Yale Law School. It is alleged that they wish to have a family but first wish "to have an opportunity to adjust themselves, mentally, spiritually and physically to each other, so as to establish a secure and permanent marriage before they become parents. In addition, both husband and wife are students and a pregnancy at this time would mean disruption of Mrs. Trubek's professional education." *Trubek v. Ullman*, Supreme Court of Errors of Connecticut, R., p. 2.

When two people marry, individual liberty is necessarily curtailed. The State and society expects that the parties will, as a result of voluntarily entering the marital status, carry out the duties and obligations required of such a relationship.

"Marriage creates contractual obligations between man and woman of the most sacred and enduring nature. It is

the basis of the family and the home and is therefore an institution upon which rests our whole way of life. For these cogent reasons the State has a very real and vital interest in the maintenance of the marriage bond."

Casale v. Casale, 138 Conn. 490 at 492.

"Marriage is a consentient covenant. It is a contract in the sense that it is entered into by agreement of the parties. But it is more than a civil contract between them, subject to their will and pleasure in respect of effects, continuance, or dissolution. It is a domestic relation having to do with the morals and civilization of a people. It is an essential institution in every well organized society. It affects in a vital manner public welfare, and its control and regulation is a matter of domestic concern within each state."

Stevens v. United States, 146 F. 2d 120 at 123.

"It well at this point to clearly understand what a marriage relationship should mean to persons who assume this sacred responsibility. Marriage carries with it definite obligations and responsibilities. It is that act by which a man and woman unite for life with the intent to discharge toward society and one another those duties which result from the relation of husband and wife. It is frequently said in this country that marriage is nothing more than a civil contract. . . . But this agreement differs essentially from all others. This contract of the parties is simply to enter into a certain status or relation. The rights and obligations of that status are fixed by society in accordance with the principles of natural law, and are beyond and above the parties themselves."

Rich v. Rich, 171 A. 515 at 517; N.J. 1934.

Thus, since marriage so affects the morals and civilization of a people, its control and regulation is a matter of domestic concern within each State. The rights and obligations of marriage are over and above the parties themselves and are fixed by society in accordance with the natural law.

As stated by our Connecticut Courts, birth control is a "highly controversial subject", *Tileston v. Ullman*, supra, 94, and after hearings by many different legislatures from 1923 through 1959, each legislature has in effect affirmed the original statute forbidding the use of drugs, medicinal articles or instruments for the purpose of preventing conception.

In enacting such legislation, it is not necessary that the purpose be expressly stated and Courts cannot assume that such legislation was adopted arbitrarily or without good reason to further some legitimate policy of the State. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522; 79 S.Ct. 437.

Every possible presumption exists in favor of the validity of a statute and this continues until the contrary is shown beyond a rational doubt. *Powell v. Commonwealth of Penn.*, 127 U.S. 678; 8 S.Ct. 992 (1888); *Everard's Breweries v. Day*, 265 U.S. 545; 44 S.Ct. 628 (1925).

B.

It is alleged that appellant Buxton is prohibited from practicing his profession and he is thereby deprived of liberty and property without due process of law.

The statutes must of necessity apply only to a small facet of Dr. Buxton's professional practice.

As previously seen "Birth control is a highly controversial subject". *Tileston v. Ullman*, supra, 94. Under such circumstances it is for the Legislature to establish the public policy

of the State. Further, if there are two or more remedies available in a given situation again it is for the Legislature to make the decision as to the choice of remedy, and there is no obligation that the most modern or scientific remedy be chosen.

In this instance, Connecticut, under its police power, has stated that the use of artificial contraceptives may not be used to prevent conception. The fact that this policy may deprive some physician of fees because he does not agree with the statute and wishes to prescribe that which is forbidden does not thereby mean that said physician is deprived of liberty or property without due process of law. "There is no right to practice medicine which is not subordinate to the police power the states". *Lambert v. Yellowley*, 272 U.S. 581; 47 S.Ct. 210.

We should also point out that appellant Buxton's claim as to loss of liberty and property is on the same footing as the appellants Poe and Doe. If the statute, Section 53-32 of the General Statutes, Revision of 1958, is a valid exercise of the police power of the State as to Poe and Doe, then anyone who aids or counsels a violation thereof obviously does not acquire any property rights.

POINT III

For the most part the appellants' argument is sociological and physiological rather than legal. They cite at great length various authorities and tables to the effect that artificial means of conception is more effective than any other method.

These same arguments have been presented many times at legislative hearings. At these hearings there have always been presented contrary opinions by eminent medical authorities. It is our view that on the basis of the record, much of the material presented by the appellants is not within the purview of the issues presented to this Court. Our Supreme Court has

already found that "Birth control is a highly controversial subject. Social thinking is divergent. It finds frequent expression at legislative hearings". *Tileston v. Ullman*, supra, 94.

In its opinion in the instant case the Connecticut Supreme Court of Errors has again pointed out that since the Tileston decision the General Assembly has "consistently refused to amend the statutes so as allow physicians to prescribe the use of contraceptive measures" (R.p. 30).

It would be expected in view of the claims of the appellants that Connecticut might have a high maternal mortality rate inasmuch as the use of artificial contraceptives is not permitted even on facts as outlined in their complaints. However, the facts are exactly contrary since Connecticut has one of the lowest maternal mortality rates in the United States.

The statistics relating to maternal mortality sustain these conclusions, to the effect that "pregnancy control" and not "birth control" is the essential factor in preserving the life and health of pregnant women.

In a five-year study of maternal mortality in Connecticut for the years 1946-1950, inclusive, Dr. Carl E. Johnson indicated that maternal mortalities for Connecticut have dropped more than 90% between 1926 and 1950. The State and National rates have followed approximately the same downward trend with Connecticut in the lead. During a period from 1946 to 1950 there were a total of 139 maternal deaths.[1]

Maternal mortality from 1951 to 1955 has shown corresponding decreases in maternal mortality in that there were only 75 deaths during this five-year period.[2]

---

[1] A Five Year Study of Maternal Mortality and Morbidity in Connecticut—1946-1950, Inclusive. Carl E. Johnson, M.D., New Haven

[2] Maternal Mortality in Connecticut, 1951-1955, Page 2. Reprinted from Connecticut Medicine—Dec. 1959 Issue, Vol. XXIII, No. 12, Page 772

As noted from the following chart,[3] 60% of the 75 deaths occurring during the period 1951 to 1955 might have been prevented:

CORRELATION OF PREVENTABILITY AND NON-PREVENTABILITY IN MATERNAL MORTALITY CONNECTICUT 1951 - 1955

Cause of Death	No. of Patients	Preventable M.D. & Others		Preventable Patient		Total Preventable	
All Causes	75	37	(49.3%)	8	(10.7%)	45	(60%)
Infection	11	7	(64%)	3	(27%)	10	(91%)
Toxemia	10	6	(60%)	2	(20%)	8	(80%)
Hemorrhage	15	11	(73%)	2	(13%)	13	(86%)
Other Causes	39	13	(30%)	1	(3%)	14	(33%)

In view of these statistics it is our claim that maternal mortality in Connecticut is fast aproaching an irreducible minimum and that there is no urgent medical need for married women to resort to artificial contraceptives for the purpose of preventing conception for health reasons.

As a matter of fact, this view was substantiated in a recent article[4] advocating relaxation of state laws concerning abortion and featuring Dr. Alan F. Guttmacher, chairman of the national medical committee of the Planned Parenthood Federation of America and director of the Margaret Sanger Research Bureau, wherein it was stated that "the requirements for legal abortions in U.S. hospitals have changed drastically in the last twenty years. As late as 1940, the three chief

[3] Maternal Mortality in Connecticut, 1951-1955, Page 9.
[4] Newsweek, August 15, 1960, Page 50.

reasons for ending pregnancy to 'save the mother's life' were serious heart, lung, and kidney diseases. Today, with better techniques for treating these ailments during pregnancy, it is seldom necessary to abort the mother to save her life."

In their brief the appellants devote some 15 pages to the science of demography (Brief pp. 45-60).

We respectfully submit that these arguments cannot aid this Court in a determination of the issues presented upon the record. Under the United States Constitution there is reserved to the States the right to enact legislation which is deemed by the Legislature to promote the morals and welfare of its people.

So far as Section 53-32 of the General Statutes, Revision of 1958, is concerned, it seems obvious that the Connecticut Legislature, speaking for the people of Connecticut, believes that the indiscriminate use of contraceptives will have an eroding effect upon the moral standards of its people.

Again, the appellants make the amazing claim that artificial devices to prevent conception are available in Connecticut to unmarried persons. Such claim overlooks Section 53-219 of the General Statutes, Revision of 1958, wherein fornication or lascivious carriage or behavior is made a crime.

At page 17 of the Brief, a portion of a letter by the then State Commissioner of Food and Drugs is quoted to substantiate their claim regarding the sale of contraceptive devices. The letter referred to is not based upon any legal authorty, and, at most, represents the personal views of the then Commissioner.

As is evidenced by t. following, the present Commissioner does not share the views quoted by the appellants: "Please be advised that this office is not responsible for or

agreed with what might have been the opionion of the Commissioner of Food and Drugs of that date".[5]

As previously indicated, the appellants claim that the views set forth in their Brief represent the opinion of the majority in the State of Connecticut. When elected representatives year after year adopt a standard of legislation designed to promote the public good, welfare and morals, who can gainsay that such action does not represent the majority will of the people.

Until the contrary is shown by positive incontrovertible proof, this Court must assume that successive action by each Legislature must reflect the choice of the majority of the electorate. Any other concept would be contrary to our basic philosophy of democratic government.

POINT IV

CONCLUSION

The judgment of the Supreme Court of Errors of Connecticut should be affirmed.

Respectfully submitted,

ALBERT L. COLES,
Attorney General

RAYMOND J. CANNON,
Asssistant Attorney General

State Capitol,
Hartford, Connecticut.,

Attorneys for Appellee

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[5] Letter of Commissioner Frassinelli, dated June 30, 1960, to Fowler V. Harper

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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 871 61

C. LEE BUXTON
Appellant

vs.

ABRAHAM S. ULLMAN, *State's Attorney,*
Appellee

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

JURISDICTIONAL STATEMENT

FOWLER V. HARPER,
127 Wall Street,
New Haven, Conn.
Attorney for Appellant

THE WHAPLES-BULLIS CO., NEW HAVEN, CONNECTICUT

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In the

Supreme Court of the United States

OCTOBER TERM, 1959

No.

C. LEE BUXTON

Appellant

vs.

ABRAHAM S. ULLMAN, *State's Attorney*,

Appellee

ON APPEAL FROM THE SUPREME COURT
OF ERRORS OF CONNECTICUT

JURISDICTIONAL STATEMENT

Appellant Buxton appeals from the judgment of the Supreme Court of Errors of Connecticut entered on December 8th, 1959, dismissing his appeal from the Superior Court of New Haven and affirming the judgment of said Superior Court sustaining defendant's demurrer to appellant's writ and complaint and dismissing the action. Appellant submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINION BELOW

The opinion of the Supreme Court of Errors of Connecticut rendered December 8th, 1959, is reported in 147 Conn. 48, 156 A.2d 508.

The opinion of the Supreme Court of Errors of Connecticut is set forth in the Appendix to this Statement.

JURISDICTION

Appellant filed his writ and complaint in the Superior Court of New Haven County, Connecticut, on May 8, 1958, pursuant to Section 52-29 General Statutes of Connecticut, Revision of 1958, and amended by stipulation February 14, 1959. The complaint sought a declaratory judgment to determine whether Section 54-196 and 53-32 of the General Statutes of Connecticut, Revision of 1958, are unconstitutional on their face or as applied to this appellant.

Appellee Ullman filed a demurrer to said complaint which was sustained by the Superior Court of New Haven County, Connecticut, in a memorandum decision filed January 5, 1959. Thereafter a motion for judgment after demurrer was sustained by said court and the complaint dismissed in a ruling filed on January 21, 1959.

Appellant thereupon filed his appeal to the Supreme Court of Errors of Connecticut on February 11, 1959. Thereafter on December 8th, 1959, the Supreme Court of Errors of Connecticut affirmed the judgment of the Superior Court.

Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Errors of Connecticut on February 19th, 1960.

This cause presents a justiciable issue. The conditions which establish the validity of the declaratory procedure were recently

set forth by this Court in *Evers* vs. *Dwyer*, 258 U. S. 202. It is submitted that this case meets the test. Appellant has standing to sue since his liberty to practice his profession and his property interest therein are involved.

There is a real and substantial controversy presented. Appellant's patients require and seek from him medical advice with respect to contraceptive devices and their use which they intend to employ to preserve their lives and their physical and emotional health. Appellant is unable to prescribe such contraceptive devices and instruments for the sole reason that appellee claims that both the giving of such advice and the use of such instruments and devices by appellant's patients are offenses under Sections 53-32 and 54-196 General Statutes of Connecticut, Revision of 1958 and that he will prosecute (as indeed he has heretofore prosecuted in *State* vs. *Nelson*, 126 Conn. 412) any violation of said statutes. Appellant claims and appellee denies that the said statutes, on their face and as applied to him, violate the Fourteenth Amendment to the Constitution of the United States. This question was raised and passed upon by the state court.

Appellant is entitled to have this important constitutional question settled insofar as his claimed rights are concerned and one of the purposes of the declaratory judgment procedure is to afford a method for such determination without subjecting appellant to the risk of fine or imprisonment or both and the possible loss of his license to practice his profession. Borchard, *Challenging Penal Statutes by Declaratory Actions*, 52 *Yale L. J.* 445.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Errors of Connecticut on appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgments on appeal in this case. *Nashville C. & St. L. R. Co.* vs. *Wallace*, 288 U. S. 249; *Evers* vs. *Dwyer*, *supra* at 202.

QUESTION PRESENTED

Whether Section 53-32 of the General Statutes of Connecticut, Revision of 1958, and Section 54-196 deprive appellant of his liberty and his property without due process of law in that he is thereby prevented from practicing his profession as an obstetrician and gynecologist according to scientific principles accepted and approved by the medical profession.

STATUTES INVOLVED

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Section 53-32, General Statutes of Connecticut, Revision of 1958:

> "Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 54-196, General Statutes of Connecticut, Revision of 1958:

> "Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

STATEMENT OF THE CASE

Appellant Buxton is a registered licensed physician and a specialist in obstetrics and gynecology. He was formerly a professor in these specialties at the Columbia-Presbyterian Medical Center in New York and at present is Professor and Chairman of the Department of Obstetrics and Gynecology at Yale University School of Medicine and the Grace-New Haven Community Hos-

pital. Appellant Buxton was and is the physician of appellants Jane Doe and Pauline Poe and it is his medical opinion that the best and safest treatment for these patients is the prescription by him and use by them of devices or instruments to prevent conception and future pregnancies. However, he is unable to administer such treatment and advice for the sole reason that the appellee, State's Attorney, claims that the giving of such advice and treatment by him and the use of such instruments by his patients are prohibited by Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, and that he will prosecute any violation of such statutes.

Appellant Buxton claims that the application of said statutes to him as a practicing physician deprives him of his liberty and his property without due process of law contrary to the 14th Amendment of the Constitution of the United States and in his complaint he asked the state court so to declare. Appellee, State's Attorney, demurred to this appellant's complaint thereby admitting all of of the aforesaid facts as alleged in appellant's complaint. After final judgment for appellee and affirmance by the Supreme Court of Errors of Connecticut appellant appeals to this Court and prays that the judgment of the Connecticut courts be reversed and that the statutes in question be declared unconstitutional.

The Questions Are Substantial

This case raises fundamental questions of personal liberty and property rights never passed upon by this Court. The statutes challenged purport to regulate the practice of medicine in an arbitrary manner which seriously restricts physicians in the practice of their profession and jeopardizes the lives and health of their patients.

POINT I

The Connecticut statutes are unconstitutional as to appellant Buxton in that they prohibit him from practicing his profession as a gynecologist and obstetrician, according to the scientific

principles upon which it is based and according to his conscience; they thereby deprive him of liberty and property without due process of law.

That the use of contraceptives is accepted by the public and endorsed by the organized medical profession in this country and by an overwhelming majority of individual physicians, see Point V of the Jurisdictional Statement in *Poe et al.* vs. *Ullman* and *Doe* vs. *Ullman*.

Appellant is Professor and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and the Grace-New Haven Community Hospital. As such, it is his professional duty to teach medical students in the various contraceptive techniques. The law of Connecticut prohibits him from utilizing in his practice the very procedures which he teaches his students to employ. He is prevented from giving the medical advice to his patients at the hospital which the profession has demonstrated is in the best interests of their health. In his judgment the use of contraceptives made unlawful by this law is the best method for preserving the life of appellant Jane Doe and the physical and mental health of appellants Poes. The law unreasonably deprives him of his property and his liberty as a physician, sworn by his professional oath to uphold the best tradition of medical science.

This physician has a constitutionally guaranteed right to make a living. The right to work, in Mr. Justice Douglas's words, is "the most precious liberty that man possesses." (Dissenting in *Barsky* vs. *Board of Regents*, 347 U. S. 442, 472.) Not only has he the right to earn a living as a medical practitioner, but he may do so free from "unreasonable and unnecessary restrictions." (Mr. Justice Butler in *Burns Baking Co.* vs. *Bryan*, 264 U. S. 504, 513, and quoted approvingly by Mr. Justice Sutherland in *Liggett Co.* vs. *Baldridge*, 278 U. S. 105, 113.) The established doctrine is that "this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to

some purpose within the competency of the State to effect." *Meyer vs. Nebraska*, 262 U. S. 390, 399.

Are the conditions reasonable? The Connecticut law permits this doctor to abort his patient to save her life (General Statutes of Connecticut, Sec. 53-29, 1958 Revision) and he may advise her on methods of preventing conception and death. *But he can advise only the most unreliable ones.* See Point II, *infra*.

It is not denied that the courts presume that a legislature, when it adopts a statute, does, indeed, have "knowledge of conditions supporting its judgment that the legislation is in the public interest." (*Hardware Dealers Mutual Fire Ins. Co. vs. Glidden*, 284 U. S. 151.) Although the presumption concededly is a heavy one, it is not irrebuttable. *Meyer vs. Nebraska, supra* at 400.) Now what facts are presented to support the presumption? The record is barren of any legislative findings that these laws are in the public interest, that they will contribute to public morality or that they promote the public health or welfare. All this Court has to go on is the presumption that the Connecticut legislature knew what it was doing in 1879 when it passed these laws to prevent illicit intercourse and the possible, vague assumption that the voluntary limitation of the family by scientifically sound devices may not be in the public interest. Both judgments are demonstrated to be erroneous. Advice for the use of instruments and the sale thereof to prevent disease are legal although they will also prevent conception. See Point I of the Jurisdictional Statement in *Doe* vs. *Ullman* and *Poe et al.* vs. *Ullman*. The overwhelming weight of scientific judgment based upon the most careful and objective research is that the public interest requires effective and reliable contraceptive practices in the interest of the health and lives of women who will be adversely affected by pregnancy. See Point II, *infra*.

Appellant has a property right in his profession. When the state unreasonably deprives him of any valuable attribute of his property, it does so without due process of law. (*Buchanan* vs.

Warley, 245 U. S. 60 (1917)). In *England* vs. *Louisiana State Board of Medical Examiners*, 259 F.2d 626 (1958), the court reasoned:

> "Without doubt it is reasonable for the State to outlaw witch doctors, voodoo queens, bee stingers, and various other cults which no reasonably intelligent man would choose for the treatment of his ill, but it would certainly be arbitrary to exclude some if not all of the following classes which Louisiana does admit to practice: dentists, osteopaths, nurses, chiropodists, optometrists, pharmacists, and mid-wives. Just where is the dividing line? Under all of the cases, we think it is that the State cannot deny to any individual the right to exercise a *reasonable* choice in the method of treatment of his ills, *nor the correlative right of practitioners to engage in the practice of a useful profession.*" (Emphasis added.)

It is the essence of the dedicated professions that the physician, like the lawyer, owes his firm allegiance to persons who have placed their physical, mental or legal welfare in his hands. In both cases it is submitted that it is an unreasonable restriction to prohibit scientifically sound procedure on the basis of judgments, unsupported by facts, that some fanciful balance of public interest will be thereby advanced. The law of Connecticut prohibits this appellant from protecting the physical and mental health of appellants Poes and the life of appellant Jane Doe by the best scientific methods, but permits him by those identical methods to protect from venereal disease persons engaged in illicit intercourse. It is submitted that it is impossible to identify this law with the general welfare and equally impossible to find that it is consistent with any acceptable principle of morality.

We have indicated elsewhere that in certain cases proper medical practice today requires knowledge of and prescription by physicians of contraceptive devices. "The proper prescription of birth control measures is an important and indeed essential aspect of

preventive medicine."[1] Physicians must exercise that reasonable judgment and skill possessed by the average member of their class and if they have additional skill and competence they must utilize that which they have.[2] Thus, the medical practitioner "must keep abreast of the times, and a departure from approved methods in general use, if it injures the patient, will render him liable, however good his intentions." *Stone* vs. *Goodman*, 241 A. D. 290, 294, 271 N. Y. S. 500.

Appellant Buxton departs "from approved methods" only under compulsion of Connecticut law. No one would contend that in Connecticut he would be guilty of malpractice in an action for the death from pregnancy of appellant Doe. But if he practiced his profession in any state but Connecticut or Massachusetts, it is submitted that his failure to prescribe an effective contraceptive device would subject him to liability for failing to exercise that reasonable judgment and skill prevailing among obstetricians and gynecologists in the locality.[3] This, it is urged, goes far toward establishing the unreasonable character of the Connecticut statutes which prevent this physician from exercising the skill and judgment which he has and which is unquestionably established in his profession as the norm for all practitioners in his specialty. Failure to adopt appropriate and customary preventive measures as well as careless diagnosis or improper treatment may constitute malpractice. *Walden* vs. *Jones*, 289 Ky. 395, 158 S. W. (2) 609; *Craig* vs. *Chambers*, 17 Ohio St. 253.

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[1] Statement by professors of Obstetrics and Gynecology, quoted in the *New York Times*, Aug. 1, 1958.

[2] See Harper and James, *Law of Torts*, II, p. 919; *Restatement of Torts*, Sec. 299 (f).

[3] *Restatement of Torts*, Sec. 299 (d).

POINT II

The Connecticut statutes are arbitrary and unreasonable in that they forbid physicians from following what the overwhelming preponderance of medical opinion regards as necessary to protect the lives and health of patients.

Guttmacher, in a poll of 3,381 physicians, found the following results as to patient acceptability, degree of trustworthiness and prescription by them.[4]

Reliability and Acceptability of Methods Prescribed

Method	Percentage of Doctors Indicating Technique As First Choice For: Prescription	Reliability	Acceptability
No. of doctors indicating one or more techniques	2,516	2,726	2,739
		Per Cent	
Diaphragm and jelly or cream	69.6	62.1	67.1
Condom	9.5	14.1	9.4
Rhythm	4.7	1.4	4.7
Condom and jelly or cream	3.7	7.7	4.3
Jelly or cream alone	3.5	1.5	6.5
Cervical cap	2.3	1.8	2.2
Abstinence	1.5	8.0	1.2
Douches	2.4	0.8	2.0
Intracervical stem pessary	1.3	2.2	1.4
Foam Powder and Sponge	0.4	0.1	0.2
Suppositories	0.6	0.1	0.8
Withdrawal	0.7	0.3	0.2

It will be noted that the only methods for controlling conception in this table which are not prohibited by the Connecticut statutes are rhythm, abstinence and withdrawal. Of these only 1.4 per

[4] *Human Fertility*, Vol. 12, No. 1, March, 1947.

cent of the replies listed rhythm as "reliable," 0.3 per cent for withdrawal and while 8 per cent rated abstinence as reliable, this method was recommended by only 1.5 per cent and regarded as acceptable by patients by 1.2 per cent.

This situation, medically, is the reverse of that in *Jacobson* vs. *Massachusetts*, 197 U. S. 11, where this Court, referring to offers of proof, rejected by the Massachusetts courts, said: "Those offers, in the main, seem to have no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox or who think that vaccination causes other diseases of the body. What everyone knows, the court must know, and therefore the state court judicially knew, as this Court knows, that an opposite theory accords with the common belief and is maintained by high medical authority." (197 U. S. 11, 30.)

In *Jacobson* this Court said further: "We must assume that when the statute in question was passed, the legislature of Massachusetts was not unaware of these opposing theories, and was compelled, of necessity, to choose between them." So, too, in *Lambert* vs. *Yellowley*, 272 U. S. 581, the Court upheld an Act of Congress limiting the amount of liquor which could be prescribed for medicinal purposes because there was substantial medical authority that spirituous liquor had no medicinal value. "... the limitation as to quantity," wrote Mr. Justice Brandeis, "must be taken as embodying an implicit Congressional finding that such liquor had no such medicinal value as gives rise to a need for larger or more frequent prescriptions. Such a finding, in the presence of well-known diverging opinions of physicians, cannot be regarded as arbitrary or without a reasonable basis." (272 U. S. 581, 595.) Mr. Justice Sutherland joined by Justices McReynolds, Butler and Stone, dissented because they found no medical opinion to support the limitation on prescriptions.

In discussing *Eyard's Breweries* vs. *Day*, 265 U. S. 545, Mr. Justice Brandeis said: "The Court further held that Congress must be regarded as having concluded—as it well might do in the absence of any concensus of opinion among physicians and in the presence of the absolute prohibition in many of the States—that malt liquor has no substantial medicinal qualities making its prescription necessary; and that this made it impossible to say the provision was an unreasonable and arbitrary exercise of power." 272 U. S. 581, 595.

The situation here is different. There is no appreciable body of "diverging" medical opinion. Insofar as there is any at all, it is negligibly "fractional." These are cases involving life and death. The experience of mankind throughout the ages, supported by the overwhelming opinion of the medical profession, is that young married couples in love with each other cannot, in the circumstances in which Dr. Buxton's patients find themselves, save their marriage and their lives by the alternatives available under the law of Connecticut. It is urged that this law is "arbitrary [and] without a reasonable basis."

Under the rationale of *Jacobson*, this law is unconstitutional. Mr. Justice Harlan there said:

> "Extreme cases can be readily suggested . . . It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of health or of his body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied in such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." (197 U. S. 11, 39.)

Under the law of Connecticut as interpreted by the Supreme Court of Errors, these "extreme" cases are included and there

is no way by which the medical profession can "protect the health and life of the individual concerned," unless this Court regards itself as "competent to interfere."

CONCLUSION

The issue in this case is of the highest importance to the appellant and of far reaching significance to the medical profession and, through it, to the public of Connecticut and the nation. It is submitted that the Fourteenth Amendment to the Constitution forbids the legislature of any state to enact laws which fly in the face of science and which unreasonably restrict physicians from giving to their patients the best medical care of which they are capable.

Respectfully submitted,

FOWLER V. HARPER,
127 Wall Street
New Haven, Conn.

APPENDIX

Supreme Court of Errors

OCTOBER TERM, 1959

C. LEE BUXTON,
Appellant

ABRAHAM S. ULLMAN, *State's Attorney*,
Appellee

Actions for declaratory judgments determining the constitutionality of legislation forbidding the use and prescription of contraceptive devices, brought to the Superior Court in New Haven County, where demurrers to the complaints were sustained, *Healey, J.*, and, the plaintiff failing to plead further, judgments were rendered in favor of the defendant, from which the plaintiffs appealed. *No error.*

Catherine G. Roraback, for the appellants (plaintiffs).

Raymond J. Cannon, assistant attorney general, with whom, on the brief, was *Albert L. Coles*, attorney general, for the appellee (defendant) in each case.

BALDWIN, C. J. The complaints in these four actions seek declaratory judgments as to the constitutionality of § 53-32 of the General Statutes, prohibiting the use of any drug, medicinal article or instrument for the purpose of preventing conception, and

§ 54-196, prohibiting the counseling or abetting of such use.[1] The plaintiff C. Lee Buxton is a licensed physician. The plaintiff Jane Doe is a married woman living with her husband. The plaintiffs Paul and Pauline Poe, as well as the plaintiffs Harold and Hanna Hoe, are husband and wife. Except for Dr. Buxton, all the plaintiffs are using, for the purpose of this litigation, fictitious names. They are patients of Dr. Buxton. The plaintiffs claim that the two statutes deprive them of rights guaranteed by the fourteenth amendment to the federal constitution. The defendant demurred to all the complaints; among his grounds were that the plaintiffs were seeking declaratory judgments on legal issues already conclusively determined by this court and that the passage of time and a change in the personnel of the court would not justify a reversal of those determinations. The trial court sustained the demurrers on these grounds, and the plaintiffs have appealed.

A demurrer to a complaint for a declaratory judgment is proper when the facts alleged do not bring the case within the scope of the statute and rules relating to declaratory judgments. General Statute §52-29; Practice Book § 277; *Hill v. Wright*, 128 Conn. 12, 15, 20 A.2d 388; Maltbie, Conn. App. Proc. § 227; see *Glens Falls Ins. Co. v. Somers*, 146 Conn. 708, 713, __ A.2d __. If the rights and jural relations of parties in the situation of these plaintiffs have been conclusively determined by previous decision of this court, the demurrers were properly sustained upon the grounds stated.

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[1]"Sec. 53-32. *Use of drugs or instruments to prevent conception.* Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

"Sec. 54-196. *Accessories.* Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Twice in the recent past this court has passed upon questions of interpretation and constitutionality of what are presently §§ 53-32 and 54-196. *State* v. *Nelson*, 126 Conn. 412, 11 A.2d 856, decided March 6, 1940, held that there was no ambiguity in the wording of the statutes which made the legislative intent uncertain so as to permit a construction which allowed an exception in favor of a duly licensed physician who prescribes the use of contraceptive measures to a patient who is a married woman when, in his professional opinion, her general health and well-being necessitate it. We said (p. 417): "Any intention on the part of the Legislature to allow [the exception claimed] is negatived not only by the absolute language used originally and preserved ever since but also, signally, by [the legislature's] repeated and recent refusals to inject an exception." We held, also (p. 422), that the statute was a valid exercise of the police power. We pointed out (p. 418) that the particular facts alleged in the information confined the issues to situations where, in the opinion of the physician, " 'the general health' of a married woman requires the use of contraceptives." We said that there was, therefore, "no occasion to determine whether an implied exception might be recognized when 'pregnancy would jeopardize life' . . . similar to that usually expressly made in statutes concerning abortion." See General Statutes §53-29.

In *Tileston* v. *Ullman*, 129 Conn. 84, 26 A.2d 582, decided May 22, 1942, the plaintiff, a licensed physician, brought an action for a declaratory judgment to determine whether the statutes forbade him from prescribing the use of contraceptives for a married woman in cases where a pregnancy would endanger her life or health and, if the statutes did, whether they were constitutional. This presented the issue which we specifically said was not before us in the *Nelson* case. We held in the *Tileston* case that, in the light of the legislative history of the statutes and the repeated and recent refusals of the legislature to inject any exception, the statutes could not be construed to allow the exception claimed, and that they were constitutional.

It is claimed that the facts in the cases at bar present an entirely different situation with respect to the rights of the plaintiffs from that presented in the *Nelson* and *Tileston* cases. In Buxton v. Ullman, the complaint alleges, in substance, and the demurrer admits, thatt he plaintiff, a licensed physician, has a patient, Jane Doe, a married woman twenty-five years of age, living with her husband. She had been admitted to the obstetrical service of the hospital where the plaintiff, an eminently qualified obstetrician and gynecologist, was in charge. She was three and one-half months pregnant and developed a condition which brought her to the very brink of death. Her physical condition is now such that conception and another pregnancy would be exceedingly dangerous to her life. She needs and requires advice as to what preventive measures can be taken to avert a recurrence of the experience she suffered. She claims a right to live a normal married life with her husband. She has asked the plaintiff for medical advice, and he has knowledge of drugs, medicinal articles and instruments which could be used by her to prevent conception and avoid the serious consequences of another pregnancy. In a companion case, Doe v. Ullman, the plaintiff is the patient described in the Buxton case, and she alleges, in substance, the same facts as are alleged in the Buxton complaint. In another companion case the complaint alleges, in substance, that the plaintiffs, Paul and Pauline Poe, are a married couple who have consulted Dr. Buxton. Mrs. Poe, who is twenty-six years old and living with her husband, has borne three abnormal children, no one of whom lived more than ten weeks. The basic cause of these abnormalities is thought by Dr. Buxton and other qualified medical specialists to be genetic, but the prognosis is very uncertain and renders the prospect of another pregnancy extremely disturbing to both Mr. and Mrs. Poe. In still another case the plaintiffs, Harold and Hanna Hoe, aged twenty-nine and twenty-six years, respectively, husband and wife, have no living children. Mrs. Hoe has been delivered of four children. Owing to the blood groupings of these plaintiffs, Mrs. Hoe's blood being Rh negative and Mr.

Hoe's Rh positive, the prospects that they can procreate a normal child is highly unlikely.

The plaintiff Buxton has knowledge of drugs, medicinal articles and instrumentalities which could be safely used to prevent conception and avert the dire consequences which have followed conception and pregnancy in the women plaintiffs, who desire to live normal married lives with their husbands. If the plaintiff Buxton, on one hand, applies this knowledge by advising these married people as to available contraceptive measures, and if, on the other hand, these married people accept and follow his advice, the statutes would be violated by all the plaintiffs. It is conceded by the demurrers that the use of contraceptives is, according to medical science, the best and safest preventive measure for the plaintiffs to follow in order to avoid pregnancy.

The plaintiffs claim that these facts raise issues not raised in the *Nelson* and *Tileston* cases. The plaintiff Buxton asserts that he has a constitutional right, distinct from that of his patients, to practice his profession free from unreasonable restraint and to advise and prescribe the use of drugs, medicinal articles and instrumentalities which he believes it to be his professional obligation to prescribe. The facts in the Buxton case differ from those in the *Tileston* case in that here the plaintiff, a physician, is asserting an alleged constitutional right of his own rather than an alleged constitutional right of a patient. Essentially, there is no real difference in the nature of the right. The effect of regulation of a business or profession is to curtail the activities of both the dispenser and the user of goods or services. Both are deprived of some advantage which they might otherwise have. The Doe, Poe and Hoe cases differ from the *Nelson* and *Tileston* cases in that the plaintiffs here are asserting their rights, as patients, to the benefit of a physician's prescription for the use of contraceptives which would relieve them of a dangerous threat to their health and happiness. Their right, too, is essentially the same as that of the physician. In other words, the difference between the *Tileston* and *Nelson* cases and those at bar lies only in the fact

t[illegible]here each plaintiff is asserting his own constitutional right, while in the *Nelson* and *Tileston* cases the doctors were attempting to assert the right of their patients to receive treatment.

It cannot be questioned that the "state may 'regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety and the public health, as well as to promote . . . the common good.'" *State* v. *Vachon*, 140 Conn. 478, 481, 101 A.2d 509, quoting from *House* v. *Mayes*, 219 U. S. 270, 282, 31 S. Ct. 234, 55 L. Ed. 213. The exercise of this power is always "subject, in the courts, to the test whether it serves the public health, safety and morals at all and whether it does so in a reasonable manner." *Amsel* v. *Brooks*, 141 Conn. 288, 294, 106 A.2d 152. In our tripartite system of government, the judiciary accords to the legislature the right to determine in the first instance what is the nature and extent of the danger to the public health, safety, morals and welfare and what are the measures best calculated to meet the threat. Courts interfere with legislation enacted under the police power only when it clearly appears that the legislative measures taken do not serve the public health, safety, morals or welfare or that they deny or interfere with private rights unreasonably. *Clark* v. *Town Council*, 145 Conn. 476, 482, 144 A.2d 327; *State* v. *Gordon*, 143 Conn. 698, 703, 125 A.2d 477; *Cyphers* v. *Allyn*, 142 Conn. 699, 705, 118 A.2d 318. It was out of respect for these fundamental principles that this court in the *Nelson* and *Tileston* cases refused to so interpret the statutes as to allow an exception to cover situations of the kind presented in the cases at bar and upheld the constitutionality of the statutes.

If the plaintiffs are correct in their claims, we would be required to follow one of two courses: overrule the *Nelson* and *Tileston* decisions by construing the statutes to include the exception proposed in those cases and thus permit physicians to prescribe, and patients to use, contraceptive measures under circumstances similar to those present in the cases at bar, and by that means sustain the constitutionality of the statutes; or hold that the statute, with-

out the claimed exception are unconstitutional. Since the *Tileston* decision in 1942, the General Assembly has consistently refused to amend the statutes so as to allow physicians to prescribe the use of contraceptive measures.[2] Furthermore, two complete revisions of the general statutes have been approved by the General Assembly and the statutes in question have been left unchanged. Rev. 1949, §§8568, 8875; Rev. 1958, §§53-32, 54-196. The legis-

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[2] 1943 Sess., H.B. 313. *An act to establish standards for contraceptive devices and their distribution* (blank bill). Referred to committee, H. Jour. p. 194, S. Jour. p. 209; committee recommended rejection and passage of substitute, H. Jour. p. 1296; House passed substitute, H. Jour. p. 1339; Senate rejected, S. Jour. p. 1313; House adhered to former action, H. Jour. p. 1480.

1945 Sess., H.B. 317. *An act concerning the rights of physicians to prescribe for their patients* (providing for permitting of physicians to prescribe methods or means for the temporary prevention of pregnancy when necessary to save life or prevent serious injury to health). Referred to committee, H. Jour. p. 263, S. Jour. p. 257; hearing held on May 1; but bill not reported thereafter.

1947 Sess. H.B. 953. *An act concerning the rights of physicians to prescribe for their patients* (providing that physicians may prescribe for the temporary prevention of pregnancy when in the opinion of the physician, pregnancy would endanger the life or injure the health of a married woman). After receiving a favorable committee report, House passed, H. Jour. p. 733; Senate rejected, S. Jour. p. 752; House adhered to former action, H. Jour. p. 808.

1949 Sess., H.B. 1110. *An act concerning the right of licensed physicians to prescribe for married women* (providing for physicians to prescribe for the health of married women). Referred to committee, H. Jour. p. 307, S. Jour. p. 368; hearing held April 12 and May 3 (executive session) but no indication of a further report.

1951 Sess. H.B. 1483. *An act concerning the right of licensed physicians to prescribe for married women* (providing for physicians to prescribe methods or means for temporary prevention of pregnancy in a married woman when pregnancy would endanger the life or injure the health of such married woman). Referred to committee, H. Jour. p. 273, S. Jour. p. 266; hearing held April 11; bill withdrawn.

lature is presumed to be aware of the interpretation placed upon its legislation by the courts and the effect which its own nonaction thereafter may have. *Herald Publishing Co. v. Bill*, 142 Conn. 53, 63, 111 A.2d 4; *Hurlbutt v. Hathaway*, 139 Conn. 258, 263, 93 A.2d 161. Courts cannot, by the process of construction, abrogate a clear expression of legislative intent, especially when, as here, unambiguous language is fortified by the refusal of the legislature, in the light of judicial interpretation, to change it. *Watrous v. Connelly*, 141 Conn. 257, 263, 105 A.2d 654; *Herald Publishing Co. v. Bill*, supra; *Pennsylvania R. Co. v. International Coal*

S.B. 696. *An act concerning the right of licensed physicians to prescribe for married women* (providing for birth control). Referred to committee. S. Jour. p. 192, H. Jour. p. 304; hearing held April 11, but bill not reported thereafter.

H.B. 1485. (Same title and content as H.B. 483). After reference to committee by both House and Senate, House passed, H. Jour. p. 717; bill not reported from Senate Committee.

1953 Sess. H.B. 1452. *An act amending an act concerning the right of licensed physicians to prescribe for married women.* After referral to committee by both the House and Senate, and after a petition was filed to get the bill out of committee, a favorable report was made. House passed, H. Jour. p. 1024. Senate recommitted, S. Jour. p. 942; no report thereafter.

1955 Sess. H.B. 1177. *An act concerning the use of drugs or instruments to prevent conception* (providing for the removal of the prohibition on physicians in the prescribing of the use of contraceptives). House passed, H. Jour. p. 949. Senate rejected, S. Jour. p. 1054.

H.B. 1182. *An act concerning the right of licensed physicians to prescribe for married women* (providing for the permitting of licensed physicians to prescribe and others to use and sell contraceptive devices). House passed, H. Jour. p. 954; Senate rejected, S. Jour. p. 1054.

1957 Sess. H.B. 572. *An act concerning the dissemination of information concerning and prescription of contraceptives to married women.* House passed, H. Jour. p. 944; Senate rejected, S. Jour. p. 867.

1959 Sess. H.B. 3427. *An act concerning prevention of conception pursuant to spiritual or medical advice.* Referred to committee, H. Jour. p. 276, S. Jour. p. 292; hearing held April 24, but bill not reported thereafter.

Mining Co., 230 U. S. 184, 198, 33 S. Ct. 893, 57 L. Ed. 1446. In short, courts cannot write legislation by judicial decree; this is particularly so when the legislature has refused to rewrite the existing legislation. The *Nelson* and *Tileston* decisions cannot be overruled by any attempt to reconstruct the statutes.

Since the injection of an exception by construction is legally impossible, can we now hold that the statutes are unconstitutional? By reason of the facts in the instant cases, the claims of infringement of constitutional rights are presented more dramatically than they have ever been before. Basically, the claims are, nevertheless, essentially the same as those which this court considered in the *Nelson* and *Tileston* cases. It may well be that the use of contraceptives is indicated as the best and safest preventive measure which medical science can offer these plaintiffs. That fact does not make it absolutely necessary for the legislature to accept such a solution in all cases, where there is, as pointed out in the *Tileston* case (p. 92), another alternative, abstinence from sexual intercourse. We cannot say that the legislature, in weighing the considerations for and against an exception legalizing contraceptive measures in cases such as the ones before us, could not reasonably conclude that, despite the occasional hardship which might result, the greater good would be served by leaving the statutes as they are.

The plaintiff's argument raises an issue of public policy. Each of the separate magistracies of our government owes to the others a duty not to trespass upon the lawful domain of the others. The judiciary has a duty to test legislative action by constitutional principles, but it cannot, in that process, usurp the power of the legislature. *State* v. *Gilbert*, 98 Conn. 702, 714, 120 A. 567; *Watnick* v. *Adorno*, 133 Conn. 511, 513, 52 A.2d 702; *General Motors Corporation* v. *Mulquin*, 134 Conn. 118, 132, 55 A.2d 732; *State ex rel. Higgins* v. *Civil Service Commission*, 139 Conn. 102, 111, 90 A.2d 862; *Herald Publishing Co.* v. *Bill*, supra. "The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly,

that will should be recognized and obeyed.' " *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 351, 57 S. Ct. 452, 81 L. Ed. 685, quoting from *Johnson* v. *United States*, 163 Fed. 30, 32; *United States* v. *Cooper Corporation*, 312 U. S. 600, 606, 61 S. Ct. 742, 85 L. Ed. 1071; *Helvering* v. *Wood*, 309 U. S. 344, 347, 60 S. Ct. 551, 84 L. Ed. 796; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 394, 60 S. Ct. 907, 84 L. Ed. 1263; *Butterworth* v. *Boyd*, 12 Cal. 2d 140, 146, 82 P.2d 434; *Collision* v. *State ex rel. Green*, 39 Del. 460, 486, 2 A.2d 97; *McDonald* v. *Eagle Coal Co.*, 99 Mont. 309, 314, 43 P.2d 635; *Brahmey* v. *Rollins*, 87 N. H. 290, 298, 179 A. 186. We conclude that §§ 53-32 and 54-196 are a constitutional exercise of legislative power.

Although this disposes of the case, we note the claim of the defendant that in the Doe, Roe and Poe cases the plaintiffs are obviously fictitious persons and it must necessarily follow that the questions sought to be adjudicated are academic and do not apply to any real person or persons. General Statutes, §52-89, provides, in part, that writs in civil actions shall describe the parties, presumably by their real names, so that they may be identified. Practice Book § 199 states, among other things, that "[i]n the captions of pleas, answers, etc., the parties may be described as John Doe v. Richard Roe et al., but this will not be sufficient in a judgment file which must give all the data necessary for use in drawing the execution." Because of the intimate and distressing details alleged in these complaints, it is understandable that the parties who are allegedly medical patients would wish to be anonymous. To obviate any possibility that the parties and the issues raised are fictitious and that the jurisdiction of the court is being invoked to decide moot questions, a plaintiff who desires to use a name other than his own should, before the case is presented in court, acquaint the court of his desires, establish the fact that the parties and issues are real although the names are fictitious, and secure the court's consent, as was done in these

cases. The privilege of using fictitious names in actions should be granted only in the rare case where the nature of the issue litigated and the interest of the parties demand it and no harm can be done to the public interest.

There is no error.

In this opinion the other judges concurred.

At a Supreme Court of Errors Held at Hartford on the First Tuesday of October, A. D. 1959.

Present, Hon. Raymond E. Baldwin, Chief Justice.

Hon. John Hamilton King
Hon. James E. Murphy
Hon. Samuel Mellitz
Hon. William J. Shea
Associate Judges.

C. Lee Buxton, of the Town of Woodbridge, County of New Haven, State of Connecticut

vs.

Abraham S. Ullman, of the Town of Hamden, County of New Haven, State of Connecticut, State's Attorney in and for the County of New Haven

On Appeal from the Superior Court for New Haven County at New Haven.

JUDGMENT.

This appeal by the plaintiff claiming error in the process, record and judgment, and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts, on file in this court, was allowed by the Superior Court for New Haven County at New Haven, on the 11th day of February, A. D.

1959, and came to this court, at its term held at Hartford, on the first Tuesday in March, A. D. 1959, and thence by continuance to the present term, when the parties appeared and were fully heard.

And now this court finds that in the record, judgment and proceedings of said Superior Court for New Haven County at New Haven, there is no error.

It is therefore considered and adjudged that said judgment be confirmed and established, and that the

appellee recover of the appellant his costs taxed at $87.20.

Date of judgment, December 8, 1959.

By the Court,
EDWARD HORWITZ, Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 61

C. LEE BUXTON,

Appellant,

v.

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF AS *AMICI CURIAE*

For Doctors Willard Allen, Allan C. Barnes, Robert H. Barter, Ralph C. Benson, Willis E. Brown, Charles Iverson Bryans, Jr., Bayard Carter, Roland Cron, John D. Cross, M. E. Davis, Gordon W. Douglas, R. Gordon Douglas, Nicholas J. Eastman, James H. Ferguson, Stanley T. Garber, George H. Gardner, Arthur L. Haskins, Douglas M. Haynes, Louis M. Hellman, L. L. Hester, R. G. Holly, Carl P. Huber, Edward C. Hughes, W. Nicholas Jones, Irwin H. Kaiser, A. E. Kanter, William C. Keetel, Robert A. Kimbrough, Jr., Kermit Krantz, Ralph E. Leigh, Frank R. Lock,

(continued on inside front cover)

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, N. Y.
Attorney for Amici Curiae

THACHER & BARTLETT,
DAVID GRUSMAN,
Of Counsel.

(Continued from front cover)

Curtis J. Lund, John S. Lyle, John Van Sicklen Maeck, Milton McCall, William J. McGanity, J. L. McKelvey, Charles E. McLennan, T. L. Montgomery, D. G. Morton, Robert E. L. Nesbitt, Jr., Michael Newton, E. Edson Nichols, Ernest W. Page, Langdon Parsons, N. F. Paxson, Franklin L. Payne, Ben Peckham, Mary DeWitt Pettit, Jack Pritchard, Harry Prystowsky, Clyde L. Randall, Duncan E. Reid, Seymour L. Romney, R. A. Ross, Philip C. Schreier, Charles S. Stevenson, Martin L. Stone, E. Steward Taylor, Howard C. Taylor, Richard W. TeLinde, W. N. Thornton, Jr., John Ullery, Frank E. Whitacre, Seward H. Wills, J. Robert Willson.

IN THE

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OCTOBER TERM, 1960

No. 61.

C. LEE BUXTON,

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v.

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE**

Sixty-six physicians hereby respectfully move for leave to file a brief annexed hereto as *amici curiae* in this case. The written consent of appellant has been obtained. The consent of the appellee was requested but refused.

These physicians are all specialists in the field of obstetrics and gynecology and are leaders in their profession. Their interest in this case arises from the fact that the Connecticut statutes herein involved, under the decision below, have deprived a fellow specialist in obstetrics and gynecology of his right to discharge his professional responsibility and to prescribe effective techniques in the treatment of patients, which have been overwhelmingly approved by the medical profession. Any such legislative encroachment on the practice of medicine threatens the right of all physicians to practice freely their profession. In addition, all of the physicians who seek to submit this

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* The names of the *amici curiae* who as individuals seek to file a brief are listed, along with the institutions with which they are connected for purposes of identification only, in Appendix A to the annexed brief.

brief as *amici curiae* are also teachers in medical schools. They seek to protect the right of students, and future generations of doctors, to give their patients the benefit of knowledge painstakingly taught in the medical schools.

The short brief which these doctors seek to submit will argue that the right of a physician to treat patients in a manner approved by the consensus of medical opinion is an essential element of a doctor's right to practice his profession free from arbitrary restraints and thus is protected by the Fourteenth Amendment. Under earlier decisions of this Court, a state can proscribe a certain form of treatment only when it is medically dubious. Here, however, the medical correctness of the advice involved is free from doubt.

Below appellant relied primarily on arguments other than protection of his right as a member of the medical profession. Since it is likely that a similar course will be pursued in this Court it is believed that the accompanying brief, which the *amici curiae* are requesting permission to file, will more fully present the position that a legislative prohibition which is unsupported by medical opinion contravenes the Fourteenth Amendment by unreasonably interfering with a doctor's right to practice his profession free from arbitrary restraints. If this principle is established it will not only be dispositive of this case but will emphasize and preserve the public responsibility of the professions.

Dated: August 19, 1960.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, N. Y.
Attorney for *Amici Curiae*.

SIMPSON THACHER & BARTLETT,
DONALD ORESMAN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

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C. LEE BUXTON,

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ON APPEAL FROM THE
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(Continued on inside front cover.)

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, N. Y.
Attorney for Amici Curiae.

SIMPSON THACHER & BARTLETT,
DONALD ORESMAN,
Of Counsel.

(*Continued from title page.*)

Kimbrough, Jr., Kermit Krantz, Ralph E. Leigh, Frank R. Lock, Curtis J. Lund, John S. Lyle, John Van Sicklen Maeck, Milton McCall, William J. McGanity, J. L. McKelvey, Charles E. McLennan, T. L. Montgomery, D. G. Morton, Robert E. L. Nesbitt, Jr., Michael Newton, E. Edson Nichols, Ernest W. Page, Langdon Parsons, N. F. Paxson, Franklin L. Payne, Ben Peckham, Mary DeWitt Pettit, Jack Pritchard, Harry Prystowsky, Clyde L. Randall, Duncan E. Reid, Seymour L. Romney, R. A. Ross, Philip C. Schreier, Charles S. Stevenson, Martin L. Stone, E. Steward Taylor, Howard C. Taylor, Richard W. TeLinde, W. N. Thornton, Jr., John Ullery, Frank E. Whitacre, Seward H. Wills, J. Robert Willson.

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In The

Supreme Court of the United States

October Term, 1960

No. 61

C. Lee Buxton,

Appellant,

v.

Abraham S. Ullman, State's Attorney,

Appellee.

BRIEF AS *AMICI CURIAE*

For Doctors Willard Allen, Allan C. Barnes, Robert H. Barter, Ralph C. Benson, Willis E. Brown, Charles Iverson Bryans, Jr., Bayard Carter, Roland Cron, John D. Cross, M. E. Davis, Gordon W. Douglas, R. Gordon Douglas, Nicholas J. Eastman, James H. Ferguson, Stanley T. Garber, George H. Gardner, Arthur L. Haskins, Douglas M. Haynes, Louis M. Hellman, L. L. Hester, R. G. Holly, Carl P. Huber, Edward C. Hughes, W. Nicholas Jones, Irwin H. Kaiser, A. E. Kanter, William C. Keetel, Robert A. Kimbrough, Jr., Kermit Krantz, Ralph E. Leigh, Frank R. Lock, Curtis J. Lund, John S. Lyle, John Van Sicklen Maeck, Milton McCall, William J. McGanity, J. L. McKelvey, Charles E. McLennan, T. L. Montgomery, D. G. Morton, Robert E. L. Nesbitt, Jr., Michael Newton, E. Edson Nichols, Ernest W. Page, Langdon Parsons, N. F. Paxson, Franklin L. Payne, Ben Peckham, Mary DeWitt Pettit, Jack Pritchard, Harry Prystowsky, Clyde L. Randall, Duncan E. Reid, Seymour L. Romney, R. A. Ross, Philip C. Schreier, Charles S. Stevenson, Martin L. Stone, E. Steward Taylor, Howard C. Taylor, Richard W. TeLinde, W. N. Thornton, Jr., John Ullery, Frank E. Whitacre, Seward H. Wills, J. Robert Willson.

Statement of Interest.

This brief *amici curiae* is filed on behalf of the 66 above-named physicians individually. Their names and the institutions with which they are affiliated are listed for purposes of identification only in Appendix A to this brief. They are specialists in the practice and teaching of obstetrics and gynecology and are leaders in their profession. All of them are heads of departments in the medical schools with which they are affiliated. Several of them are past presidents of the American Gynecological Society, the American Association of Obstetricians and Gynecologists or the College of Obstetrics and Gynecology. Appellant has consented to the filing of this brief. Consent of appellee was requested but refused.

The Connecticut statutes at issue here deprive physicians practicing in obstetrics and gynecology of an important and effective remedy in the treatment of patients. The means proscribed by the statutes have long been endorsed by the overwhelming consensus of medical opinion.

These doctors, on whose behalf this brief is filed, have a profound concern with and seek to establish the right of physicians to fulfill their professional and moral obligations to their patients by employing every means known to medical science and approved by the medical community. A legislative prohibition which is unsupported by medical opinion contravenes the Fourteenth Amendment by unreasonably interfering with a doctor's right to discharge his responsibility to patients by practicing his profession to the best of his ability in conformity with accepted medical standards and by communicating his advice to his patients.

Recognition of this right of the doctor would not interfere with the right of members of the public not to seek his advice or not to follow it when given, for religious or any other reason.

Question Presented.

Whether Section 53-32 and Section 54-196 of the General Statutes of Connecticut, Revision of 1958, are unconstitutional as depriving physicians of their right to practice medicine in accordance with principles generally approved by the medical profession.

Statutes Involved.

Statutes involved in this case are Sections 53-32 and 54-196, General Statutes of Connecticut, Revision of 1958.

Section 53-32, General Statutes of Connecticut, Revision of 1958, provides:

> "**Use of drugs or instruments to prevent conception.** Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned."

Section 54-196, General Statutes of Connecticut, Revision of 1958, provides:

> "**Accessories.** Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Statement of the Case.

Appellant, Dr. C. Lee Buxton, is a licensed physician and a specialist in obstetrics and gynecology. He was formerly a professor at the Columbia-Presbyterian Medical Center in New York and is presently Professor and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and a practicing physician associated with the Grace-New Haven Community Hospital. In his capacity as physician of appellants, Jane Doe and Pauline Poe, Dr. Buxton concluded that prescription of techniques designed to prevent future pregnancies was necessary to preserve the health of these patients. Although such treatment is overwhelmingly approved in cases like these, and is freely administered in practically every state in the Union, Dr. Buxton was prevented by Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, from fulfilling the duty he owed his patients. As interpreted by the Connecticut Courts, and by appellee, State's Attorney, the giving of such advice and treatment by him are unlawful.

The Proceedings Below.

Appellant Buxton brought a declaratory judgment action in the state courts, claiming that application of these statutes to him as a practicing physician deprived him of liberty and property without due process of law and thus violated the Fourteenth Amendment of the Constitution of the United States. Appellee demurred to the complaint, and the demurrer was sustained. This holding was affirmed by the Supreme Court of Errors of Connecticut on December 8, 1959, and the opinion is reported at 147 Conn. 48, 156 A. 2d 508.

Summary of Argument.

Appellant's right to practice the profession of medicine, a right protected by the Fourteenth Amendment, is seriously impaired by the Connecticut statutes herein involved. These statutes prevent a physician from fulfilling his duty to his patients because he is unable to utilize fully recognized medical techniques.

Such a prohibition interferes with his professional obligations to his patients, arbitrarily and unreasonably. This Court has indicated that state interferences with the doctor-patient relationship will be viewed as reasonable only where there is a bona fide dispute over conflicting theories of treatment. Since techniques proscribed by the Connecticut statutes have received the approval of the medical community generally, no such dispute exists in this case and the statutes are unconstitutional.

Interference with the doctor-patient relationship at issue here should be distinguished from ordinary economic regulation. The doctor-patient relationship involves deeply rooted obligations requiring the exercise by the physician of all the established skills developed by the medical profession. The doctor should be free to communicate to his patients advice so formulated, and they should not be denied the benefit of receiving it.

ARGUMENT.

I.

The Connecticut statutes deprive appellant of due process of law by unreasonably interfering with his practice of medicine.

A. The right to engage in a profession free from arbitrary restraints is protected by the Fourteenth Amendment.

In *Dent* v. *West Virginia*, 129 U. S. 114, 121 (1889), a case dealing with the practice of medicine, this Court recognized an individual's right to follow a profession of his choosing and in *Truax* v. *Raich*, 239 U. S. 33, 41 (1915), the right to work was characterized as "the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." See also *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897).

As the right to engage in an occupation is protected by the Fourteenth Amendment, an individual cannot be excluded from such occupation for reasons that contravene due process. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238-39 (1957); *Konigsberg* v. *State Bar of California*, 353 U. S. 252, 257-258 (1957). *Cf. Wieman* v. *Updegraff*, 344 U. S. 183, 191-192 (1952); *Peters* v. *Hobby*, 349 U. S. 331, 352 (1955) (concurring opinion).

The Court recently reaffirmed this position in *Greene* v. *McElroy*, 360 U. S. 474, 492 (1959), when it stated that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

B. The right of a physician to treat patients in a medically approved manner is an essential element of his right to engage in his profession.

A state need not totally exclude an individual from a profession in order to violate due process. "Unreasonable interference" is also within the constitutional prohibition. *Cf. Greene* v. *McElroy*, 360 U. S. 474, 492 (1959); *Wieman* v. *Updegraff*, 344 U. S. 183 (1952).

The statutes involved in this case interfere in a crucial manner with the doctor's right to practice. They prevent him from saving the life and preserving the health of some of his patients. Although a recognized medical course is available, the statute prevents him from providing it, thwarting the performance of the physician's historic duty and materially impairing his professional effectiveness. The doctor's position in our society is unique. He is charged with the highest responsibility, both legal and moral, to care for the welfare of the sick and infirm in conformity with tested medical advances. As he leaves medical school he is generally required to take the ancient vow of Hippocrates, which provides in part:

> "The regimen I adopt shall be for the benefit of my patients according to my ability and judgment. . . . Whatsoever house I enter, there will I go for the benefit of the sick. . . ." (Reprinted in 15 Encyclopaedia Britannica 197, 14th ed., 1957.)

Physicians throughout history have recognized a sacred obligation to their patients. More than 800 years ago the philosopher and scholar Maimonides, who was also a practicing physician, expressed the doctor's responsibility to increase his knowledge and use such knowledge to aid his patients in the famous prayer he uttered before starting his daily medical rounds:

"I begin once more my daily work. Be Thou with me, Almighty Father of Mercy, in all my efforts to heal the sick. For without Thee, man is but a helpless creature. Grant that I may be filled with love for my art and for my fellow-men. May the thirst for gain and the desire for fame be far from my heart. For these are the enemies of Pity and the ministers of Hate. Grant that I may be able to devote myself, body and soul to Thy children who suffer from pain. Preserve my strength, that I may be able to restore the strength of the sick and the poor, the good and the bad, the friend and the foe. Let me see in the sufferer the man alone. When wiser men teach me, let me be humble to learn; for the mind of man is so puny; and the art of healing is so vast. But when fools are ready to advise me or to find fault with me, let me not listen to their folly. Let me be intent upon one thing, O Father of Mercy, to be always merciful to Thy suffering children.

"May there never rise in me the notion that I know enough, but give me strength and leisure and zeal to enlarge my knowledge. Our work is great, and the mind of man presses forward forever. Thou hast chosen in Thy grace, to watch over the life and death of Thy creature. I am about to fulfill my duties, guide me in this immense work so that it may be of avail." (Reprinted in Kagan, *Maimonides' Prayer,* Annals of Medical History, vol. 10, n.s.; p. 429, 1938.)

The medical community has constantly striven to protect the patient by urging doctors to follow scientific principles only. Chapter 1, §2 of the Principles of Medical Ethics of the American Medical Association adopted in 1953 (reprinted in Fitts & Fitts, *Ethical Standards of the Medical Profession,* Annals of the American Academy of Political and Social Science, January, 1955), provided:

"In order that a physician may best serve his patients, he is expected to exalt the standards of his profession and to extend its sphere of usefulness. To the same end, he should not base his practice on an exclusive dogma or a sectarian system for 'sects are implacable despots; to accept their thralldom is to take away all liberty from one's action and thought.' A sectarian or cultist as applied to medicine is one who alleges to follow or in his practice follows a dogma, tenet or principle based on the authority of its promulgator to the exclusion of demonstration and scientific experience."

Section 3 of the current Principles of Medical Ethics distributed by the American Medical Association continues to urge a "scientific approach":

"A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily associate professionally with anyone who violates this principle."

Courts, as well as scholars, have recognized the responsibility of the physician. In *Dent* v. *West Virginia*, 129 U. S. 114, this Court stated:

"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses." (at p. 122)

In *United States* v. *One Package*, 86 F. 2d 737 (2 Cir., 1936), the Court avoided a constitutional argument by construing the Tariff Act of 1930 as not applying to birth control devices mailed to a physician. The Act could not apply, thought the Court, to prevent the importation, sale or carriage by mail of things which might "intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients." (at p. 739)

Not only have the courts recognized the physician's duty to his patients but they have placed an affirmative obligation upon him to exercise his skill. See *Walden* v. *Jones*, 289 Ky. 395, 158 S. W. 2d 609 (1942).

The fact that the Connecticut statutes may immunize doctors in that state from malpractice suits based on their failure to recommend prohibited techniques is of no moment. They do not and cannot immunize a doctor from the demoralizing realization that he is required by law to fail to live up to the standards of his profession and to neglect the welfare of his patients. They cannot obscure the fact that they have struck a sharp blow at individual professional responsibility. The state cannot thus intrude upon a physician's moral and professional obligation to preserve the life and health of his patients, a matter for which his exclusive franchise makes him, and not the state, responsible. The Principles of Medical Ethics currently distributed by the American Medical Association stress his personal responsibility to his patients:

> "SECTION 1. The principal objective of the medical profession is to render service to humanity with full respect for the dignity of man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion.
>
> • • •

"SECTION 2. Physicians should strive continually to improve medical knowledge and skill, and should make available to their patients and colleagues the benefits of their professional attainments.

* * *

"SECTION 6. A physician should not dispose of his services under terms or conditions which tend to interfere with or impair the free and complete exercise of his medical judgment and skill or tend to cause a deterioration of the quality of medical care."

Only the most compelling necessities, clearly within the range of the police power, could possibly justify a statute which interferes so seriously with the profoundest obligations of the medical profession.

C. A state cannot interfere with the practice of medicine by prohibiting a certain mode of treatment unless the proscribed treatment is medically unsupportable or dubious.

State statutes interfering with the practice of medicine have been upheld by this Court only when the treatment prohibited by the legislature has not been approved by medical opinion generally.

In *Everard's Breweries* v. *Day*, 265 U. S. 545 (1924), where the Court upheld the constitutionality of a statute preventing doctors from prescribing malt liquors, it pointed out that "There is no consensus of opinion among physicians and medical authorities that they have any substantial value as medicinal agents; and while there is some difference of opinion on this subject the question is, at the most, debatable." (at p. 562)

That the *Everard's* case turned on the lack of agreement in medical circles is reinforced by the view of that case expressed by Mr. Justice Brandeis in *Lambert* v. *Yellowley*, 272 U. S. 581 (1926):

> "The Court further held that Congress must be regarded as having concluded—as it well might do in the absence of any consensus of opinion among physicians and in the presence of the absolute prohibition in many of the States—that malt liquor has no substantial medicinal qualities making its prescription necessary; and that this made it impossible to say the provision was an unreasonable and arbitrary exercise of power." (at p. 594)

The *Lambert* case itself indicates that a doctor's right to prescribe proper treatment can be limited only when the treatment is dubious and not when it represents the consensus of medical opinion. In that case, a physician challenged the constitutionality of a provision of the National Prohibition Act which limited the quantity of spirituous liquors which a doctor was permitted to prescribe. He claimed that "to treat the diseases of his patients and to promote their physical well-being, according to the untrammeled exercise of his best skill and scientifically trained judgment, and, to that end, to advise the use of such machines and medical treatment as in his opinion are best calculated to effect their cure and establish their health, is an essential part of his constitutional rights as a physician." The Court upheld the constitutionality of the statute on the ground that the medical profession had not approved the use of spirituous liquor as proper treatment. Mr. Justice Brandeis noted that Lambert's "belief in the medicinal value of such liquor is not of controlling significance; it merely places him in what was shown . . . to be the minor fraction of his profession," (at p. 596) and that "high medical authority" was in conflict as to the medicinal value of spirituous and vinous liquors. (at p. 597)

A somewhat similar case was *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905). While the physician's right to practice his profession free from unreasonable interference was not involved, the case upheld a state's right to prescribe a certain form of medication or treatment when it had overwhelming professional support. The Court emphasized that the consensus of medical opinion had favored smallpox vaccination "for nearly a century" (at pp. 23-24). In *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960), *Jacobson* was cited by this Court not as supporting the police power of the state but for the proposition that "where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a subordinating interest which is compelling."

This Court has sustained only those regulations which, in effect, allowed the regulating body to choose among competing medical theories. In such cases, a physician cannot be said to be inexorably constrained by professional duty to follow the course with which the state seeks to interfere. But where professional opinion leaves no such choice and the legislative body unreasonably forbids full discharge of professional obligation, the legislation interferes inadmissibly not only with the right to practice a profession but with the concomitant right to communicate to patients the opinion and advice of the physician. By the same token, it prevents patients from receiving the advice. Of course, those who for religious or other reasons do not wish to obtain such advice or wish to disregard it are completely free to do so.

D. The advisability and necessity of the prohibited techniques in this case are free from doubt.

The medical authorities supporting the advice which plaintiff should give are extensively reviewed, we have

been advised, both in appellants' briefs and in the brief *amicus* proposed to be filed on behalf of the Planned Parenthood Federation of America, Inc. The unsatisfactory nature of other preventive measures which have been suggested, in light of medical knowledge, is set forth in those briefs. Indeed, it stands admitted on this record. The complaint alleged:

> "8. Medically speaking, the use of such articles, drugs and instruments is indicated as the best and safest preventive measure necessary for the protection and preservation of the life and health of said patient."

On familiar principles, the demurrer admitted these conclusions of fact. *Buxton* v. *Ullman*, 147 Conn. 48, 156 A. 2d 508, 512 (1959).

No controversy in responsible medical opinion over the advisability of the treatment, such as that present in *Everard's Breweries*, *Lambert* or *Jacobson*, exists here. The Connecticut statutes prevent appellant from administering, or even advising about, techniques which may be necessary to protect the health and save the lives of his patients.

In *Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957), this Court stressed the importance of preserving our basic freedoms in the quest for knowledge:

> "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (at p. 250)

It would be ironic if the freedom to conquer new frontiers in medicine were jealously guarded but the duty of physicians to give the public the benefits of such profes-

sional conquests were to be subject to legislative whims. Professions which are to be bold and which are to observe maximum public responsibility must be as free as possible to obey professional conscience and should not be merely put in the same category as the butcher, the baker and the candlestick maker.

Conclusion.

The judgment of the Supreme Court of Errors of Connecticut should be reversed.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
120 Broadway,
New York 5, N. Y.
Attorney for *Amici Curiae.*

SIMPSON THACHER & BARTLETT,
DONALD ORESMAN,
Of Counsel.

APPENDIX A

Names of *amici curiae*. (The institutions with which they are affiliated are listed for purposes of identification only.)

WILLARD ALLEN, M.D.
(Washington University School of Medicine, St. Louis, Mo.)

ALLAN C. BARNES, M.D.
(Western Reserve University School of Medicine, Cleveland, Ohio)

ROBERT H. BARTER, M.D.
(George Washington University School of Medicine, Washington, D. C.)

RALPH C. BENSON, M.D.
(University of Oregon Medical School, Portland, Ore.)

WILLIS E. BROWN, M.D.
(University of Arkansas School of Medicine, Little Rock, Ark.)

CHARLES IVERSON BRYANS, JR., M.D.
(Medical College of Georgia, Augusta, Ga.)

BAYARD CARTER, M.D.
(Duke University School of Medicine, Durham, N. C.)

ROLAND CRON, M.D.
(Marquette University School of Medicine, Milwaukee, Wis.)

JOHN D. CROSS, M.D.
(Emory University School of Medicine, Atlanta, Ga.)

M. E. DAVIS, M.D.
(University of Chicago School of Medicine, Chicago, Ill.)

GORDON W. DOUGLAS, M.D.
(New York University School of Medicine, New York, N. Y.)

R. GORDON DOUGLAS, M.D.
(Cornell University Medical College, New York, N. Y.)

NICHOLAS J. EASTMAN, M.D.
(Johns Hopkins University School of Medicine, Baltimore, Md.)

JAMES H. FERGUSON, M.D.
(University of Miami School of Medicine, Coral Gables, Fla.)

STANLEY T. GARBER, M.D.
(University of Cincinnati College of Medicine, Cincinnati, Ohio)

GEORGE H. GARDNER, M.D.
(Northwestern University Medical College, Chicago, Ill.)

ARTHUR L. HASKINS, M.D.
(University of Maryland School of Medicine, Baltimore, Md.)

DOUGLAS M. HAYNES, M.D.
(University of Louisville School of Medicine, Louisville, Ky.)

LOUIS M. HELLMAN, M.D.
(State University of New York, Downstate Medical Center College of Medicine, Brooklyn, N. Y.)

L. L. HESTER, M.D.
(Medical College of South Carolina, Charleston, S. C.)

R. G. HOLLY, M.D.
(University of Nebraska College of Medicine, Omaha, Neb.)

CARL P. HUBER, M.D.
(Indiana University School of Medicine, Indianapolis, Ind.)

EDWARD C. HUGHES, M.D.
(State University of New York, Upstate Medical Center College of Medicine, Syracuse, N. Y.)

W. NICHOLAS JONES, M.D.
(Medical College of Alabama, Birmingham, Ala.)

IRWIN H. KAISER, M.D.
(University of Utah College of Medicine, Salt Lake City, Utah)

A. E. KANTER, M.D.
(Chicago Medical School, Chicago, Ill.)

WILLIAM C. KEETEL, M.D.
(State University of Iowa College of Medicine, Iowa City, Iowa)

ROBERT A. KIMBROUGH, JR., M.D.
(Postgraduate School of Medicine, University of Pennsylvania, Philadelphia, Pa.)

KERMIT KRANTZ, M.D.
(University of Kansas School of Medicine, Kansas City, Kan.)

RALPH E. LEIGH, M.D.
(University of North Dakota School of Medicine, Grand Forks, N. D.)

FRANK R. LOCK, M.D.
(Bowman Gray School of Medicine, Winston Salem, N. C.)

CURTIS J. LUND, M.D.
(University of Rochester School of Medicine, Rochester, N. Y.)

JOHN S. LYLE, M.D.
(Dartmouth Medical School, Hanover, N. H.)

JOHN VAN SICKLEN MAECK, M.D.
(University of Vermont College of Medicine, Burlington, Vt.)

MILTON MCCALL, M.D.
(University of Pittsburgh School of Medicine, Pittsburgh, Pa.)

WILLIAM J. MCGANITY, M.D.
(University of Texas Medical Branch, Galveston, Texas)

J. L. MCKELVEY, M.D.
(University of Minnesota Medical School, Minneapolis, Minn.)

CHARLES E. MCLENNAN, M.D.
(Stanford University School of Medicine, Stanford, Calif.)

T. L. MONTGOMERY, M.D.
(Jefferson Medical College of Philadelphia, Philadelphia, Pa.)

D. G. MORTON, M.D.
(University of California School of Medicine, Los Angeles, Calif.)

ROBERT E. L. NESBITT, JR., M.D.
(Albany Medical College of Union University, Albany, N. Y.)

MICHAEL NEWTON, M.D.
(University of Mississippi School of Medicine, Jackson, Miss.)

E. EDSON NICHOLS, M.D.
(College of Medical Evangelists School of Medicine, Los Angeles, Calif.)

ERNEST W. PAGE, M.D.
(University of California School of Medicine, San Francisco, Calif.)

LANGDON PARSONS, M.D.
(Boston University School of Medicine, Boston, Mass.)

N. F. PAXSON, M.D.
(Hahnemann Medical College, Philadelphia, Pa.)

FRANKLIN L. PAYNE, M.D.
(University of Pennsylvania School of Medicine, Philadelphia, Pa.)

BEN PECKHAM, M.D.
(University of Wisconsin, Madison, Wis.)

MARY DEWITT PETTIT, M.D.
(Woman's Medical College of Pennsylvania, Philadelphia, Pa.)

JACK PRITCHARD, M.D.
(University of Texas Southwestern Medical School, Dallas, Texas)

HARRY PRYSTOWSKY, M.D.
(University of Florida School of Medicine, Gainesville, Fla.)

CLYDE L. RANDALL, M.D.
(University of Buffalo, Buffalo, N. Y.)

DUNCAN E. REID, M.D.
(Harvard Medical School, Boston, Mass.)

SEYMOUR L. ROMNEY, M.D.
(Albert Einstein College of Medicine of Yeshiva University, New York, N. Y.)

R. A. ROSS, M.D.
(University of North Carolina School of Medicine, Chapel Hill, N. C.)

PHILIP C. SCHREIER, M.D.
(University of Tennessee College of Medicine, Memphis, Tenn.)

CHARLES S. STEVENSON, M.D.
(Wayne State University College of Medicine, Detroit, Mich.)

MARTIN L. STONE, M.D.
(New York Medical College, New York, N. Y.)

E. STEWARD TAYLOR, M.D.
(University of Colorado School of Medicine, Denver, Col.)

HOWARD C. TAYLOR, M.D.
(Columbia University College of Physicians & Surgeons, New York, N. Y.)

RICHARD W. TELINDE, M.D.
(Johns Hopkins University School of Medicine, Baltimore, Md.)

W. N. THORNTON, JR., M.D.
(University of Virginia School of Medicine, Charlottesville, Va.)

JOHN ULLERY, M.D.
(Ohio State University College of Medicine, Columbus, Ohio)

FRANK E. WHITACRE, M.D.
(Vanderbilt University School of Medicine, Nashville, Tenn.)

SEWARD H. WILLS, M.D.
(Baylor University College of Medicine, Houston, Texas)

J. ROBERT WILLSON, M.D.
(Temple University School of Medicine, Philadelphia, Pa.)

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On Appeal from the Supreme Court of Errors of Connecticut

MOTION FOR LEAVE TO FILE A BRIEF WITH BRIEF AND APPENDICES AS *AMICUS CURIAE* FOR THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

MORRIS L. ERNST
HARRIET F. PILPEL
285 Madison Avenue
New York 17, New York
Attorneys for Amicus Curiae

GREENBAUM, WOLFF & ERNST
JULIA PERLES
NANCY F. WECHSLER
Of Counsel

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On Appeal from the Supreme Court of Errors of Connecticut

MOTION FOR LEAVE TO FILE A BRIEF AS *Amicus Curiae*

Planned Parenthood Federation of America, Inc., hereinafter called "Federation" hereby respectfully moves for leave to file a brief annexed hereto as *amicus curiae* in this case.

Appellants Doe, the Poes and Buxton have consented in writing to the filing of Federation's *amicus* brief. Appellee Ullman has declined to consent thereto. Federation is a membership corporation originally organized in 1922 and existing under the laws of the State of New York. Its purposes are, among others, as stated in its presently effective Certificate of Incorporation: "To undertake, support and promote investigation and scientific research touching upon and embracing the sociological, biological, medical and economic aspects of marriage, procreation, maternal health and family betterment, and to collect, circulate, evaluate and disseminate information concerning said subjects of investigation and scientific research and matters related thereto."

Federation consists of a central coordinating body plus 96 state and local affiliates operating in 28 states and the District of Columbia, all sponsoring medical services or doing research in the field of contraception. Federation's affiliate in Connecticut, the Planned Parenthood League of Connecticut, is restricted in its operations by the laws herein challenged. Federation is an active member of the International Planned Parenthood Federation which links medical research and services in conception control in 26 countries and cooperates with the United States and other governments. Federation, and most of its affiliates have tax exemption under §501(c)(3) of the United States Internal Revenue Code of 1959.

Through Federation's Medical, Biological Research and Social Research Committees, its affiliates receive guidance in the areas of medically directed child spacing, treatment of infertility problems and education for marriage and parenthood. Each of the affiliates functions under strict

medical standards promulgated by the National Medical Committee in conjunction with local medical advisory committees, all such committees consisting exclusively of physicians.

Many of Federation's affiliates operate in coöperation with local public health facilities. The affiliates are also teaching centers for physicians, nurses and social workers and provide for referral services to qualified medical specialists.

By means of its various committees, Federation operates as a clearing house for information and services relating to conception control. It formulates nation-wide medical and clinical standards and acts as an agency for public and professional education in this field. Its medical director and other consultants confer with medical school faculties and local committees in relation to teaching techniques, formation of clinics and the like.

Federation works with medical, social work, religious and professional organizations throughout the country. It is a member of the National Health Council, the American Public Health Association, and the Council of National Organizations of the Adult Education Association. It is affiliated with the National Conference on Social Welfare and is listed as a "voluntary agency of medical interest" in the American Medical Association's Handbook for Medical Societies and Individual Physicians. Federation sponsors research by scientists in leading universities and laboratories and guides and assists in the clinical testing of improved contraceptive methods. It organizes conferences for experts in the natural and social sciences and it collates information and research and fosters publication of articles in scientific journals. It is, in short, the national health agency in the field of contraception.

The laws involved in these cases as interpreted by the court below adversely affect Federation both directly and indirectly. Their direct result is to make it impossible in Connecticut for Federation and its affiliate there to render the health services which are rendered by *amicus* elsewhere. Their indirect effect is to threaten the existence and functioning of Federation and its affiliates throughout the country. If this Court affirms the decision below, there will be no constitutional obstacle to the passage of similar laws by other jurisdictions which would vitally affect the health services for which Federation and its affiliates were organized and are operating.

If the legislature of the State of Connecticut had decided for whatever reason to prohibit the prescription by physicians of the Salk vaccine, this would pose a very serious problem for a doctor and his patients in the State of Connecticut. But such a prohibition would, in addition, present a major threat and a major question of constitutional law for the national health agency functioning in the area of control of infantile paralysis and for the nation as a whole. In all fields of medicine, research and clinical practice transcend state boundary lines as indeed do the health conditions which organizations like Federation are founded to study and control. If medical practice in one specified field is prohibited by one state, that prohibition jeopardizes the activities of physicians and of health agencies everywhere in that field. Moreover, a national voluntary health organization composed of local groups, like Federation, is of necessity dependent upon and nourished by what happens in the field of its special endeavors throughout the country.

Federation is in a unique position to supply this Court with an overall picture of the problem herein involved on a local, national and international scale, a picture which is directly relevant to the determination of these cases.

Respectfully submitted,

MORRIS L. ERNST
HARRIET F. PILPEL
285 Madison Avenue
New York 17, New York

GREENBAUM, WOLFF & ERNST
JULIA PERLES
NANCY F. WECHSLER
of Counsel

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On Appeal from the Supreme Court of Errors of Connecticut

BRIEF AS *AMICUS CURIAE* FOR THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC.

Opinion Below

The opinion of the Supreme Court of Errors of Connecticut was rendered on December 8th, 1959 and is reported in 147 Conn. 48, 156 A. 2d 508 and appears in the Record at pp. 25-35.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (2) in that the cause involves the validity of state statutes (Sections 53-32 and 54-196 General Statutes of Connecticut, Revision of 1958) challenged as imposing unconstitutional deprivations of appellants' life, liberty and property, under the due process clause of the Fourteenth Amendment to the Constitution of the United States, the decision below having upheld their validity.

Statutes Involved

(1) Section 53-32, General Statutes of Connecticut, Revision of 1958:

> "Use of drugs or instruments to prevent conception. Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

(2) Section 54-196, General Statutes of Connecticut, Revision of 1958:

> "Accessories. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Questions Presented

(1) Whether Sections 53-32 and 54-196, General Statutes of Connecticut (Revision of 1958) as construed below, deprive appellant Buxton of liberty and property without due process of law, by forbidding him to utilize drugs, medicinal articles and instruments which in his judgment are the best and safest medical means for the treatment of his patients, the other appellants herein.

(2) Whether Sections 53-32 and 54-196 General Statutes of Connecticut (Revision of 1958), as construed below deprive appellant Doe and the appellants Poe of life and liberty without dueprocess of law, by forbidding them to use drugs, medicinal articles or instruments sought to be prescribed for them by their physician, the appellant, Buxton for the prevention of conception and thereby subjecting them to serious risk of loss of life, liberty and health.

Statement of the Case

Amicus respectfully refers the Court to the statement of the case incorporated in the brief for the appellants.

Interest of Federation as *Amicus Curiae*

We have in the accompanying notice of motion set forth the pertinent facts concerning the Planned Parenthood Federation of America and the reasons why we believe acceptance by this Court of this brief submitted on

behalf of Federation as *amicus curiae* is appropriate to consideration of the question of reasonableness which is at the core of these cases. We believe that the litigants here involved will not cover the material presented herein.

Summary of Argument

The Connecticut laws, as construed and applied below, prohibit physicians from prescribing, and patients from using drugs, medicinal articles or instruments for the prevention of conception, regardless of the health needs of the patients and the professional judgment of the physician. No exception for any purpose whatsoever is permitted: the laws carry criminal penalties for any married citizen of Connecticut who uses contraceptives even for compelling reasons of health and on medical advice; they threaten with criminal conviction any physician whose professional judgment leads him to prescribe such remedies.

Neither the legislative record, the record of these proceedings nor the opinion of the Supreme Court of Errors of Connecticut supplies a rationale for these stringent prohibitions.

Since "underlying questions of fact" condition the constitutionality of the Connecticut laws [*O'Gorman & Young Hartford Fire Insurance Co.*, 282 U. S. 251 (1931)], this Federation will in this brief seek to demonstrate that the facts exist which can sustain this legislation. Although we recognize that there is a presumption of the existence of such a state of facts "there are limits to the extent to which the presumption of constitutionality can

be pressed" especially where as here life and liberty are at stake. [See *Skinner* v. *Oklahoma*, 316 U. S. 534, 544 (1942) concurring opinion of Chief Justice Stone; *cf. Williamson* v. *Lee Optical Co.*, 348 U. S. 486, 487 (1955)]. *Amicus* Federation submits that the rigid prohibitions imposed by the Connecticut statutes cannot meet any test of due process heretofore enunciated by this Court.

As the national health agency in the field of conception control, *amicus* has assembled herein and in the Appendices hereto facts of common knowledge which, it is submitted, show that:

(a) There is no reasonable basis for the Connecticut laws in the facts of record or in the decision below;

(b) There is no reasonable basis for the Connecticut laws in medical science which in substantial unanimity regards as medically necessary prescription of drugs, medicinal articles and instruments in cases such as those at bar and which considers that there is no reasonable alternative to such prescription;

(c) There is no reasonable basis for the Connecticut laws in the tenets of any religious group today; on the contrary, all religious groups sanction and many call for conception control in cases such as those at bar;

(d) There is no reasonable basis for the Connecticut laws in contemporary community mores which likewise sanction, if indeed, they do not demand, the prescription of drugs, medicinal articles and instruments in cases such as those at bar; and

(e) There is no reasonable basis for the Connecticut laws because they are not restricted to the accom-

plishment of the supposed legislative objectives; because they cause severe deprivations of basic rights; and because in any event in their operation they cannot possibly tend toward the achievement of the supposed legislative objectives.

POINT I

There is no reasonable basis in the facts of record or in the decision below for the application of the challenged statutes to the appellants.

The law of Connecticut, as authoritatively construed below by the Supreme Court of Errors of that state, results on the conceded facts in the following: the physical condition of the appellant Doe, a married woman living with her husband and of the appellants Poe, a married couple, require them to avoid conception, but the appellant Dr. Buxton (a physician expert in the field of obstetrics and gynecology) is prevented by the statutes herein challenged from prescribing for them drugs, medicinal articles or instruments conceded by the state and by the Court below to be "the best and safest preventive measure" which medical science can offer (R. 29).

On this record, in other words, married citizens of the state of Connecticut, in desperate need of treatment which the medical profession concededly has available, whose happiness, health and very lives are at stake, are barred from access to such treatment. And physicians, who are obliged morally, ethically and indeed by legal standards ordinarily applicable (see Point II pp. 24-27 below), to use the best medical means available for the treatment of their

patients, are prevented by the challenged laws from so doing.

Amicus Planned Parenthood Federation of America Inc. urges that these laws, leading to these results are unconstitutional insofar as they affect the appellants here and others similarly situated. We propose in this brief to demonstrate the absence of any reasonable basis for these laws; whether they be regarded from the standpoint of the deprivation of the liberty and property of appellant Dr. Buxton, or from the standpoint of the deprivation of life and liberty of appellants Doe and the Poes. As to all of the appellants, the basic question presented is whether there is any reasonable basis for the admitted impact of the laws upon them.[1]

This Court has always made clear, even with reference to the less stringent standards of due process applicable to regulation of business and industrial activity (as opposed to such basic human rights as are here involved) that:

> "[a] law shall not be unreasonable, arbitrary or capricious, and * * * the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934).

It therefore becomes pertinent to inquire whether the challenged legislation is directed to objectives within the competence of the legislature, and the extent, if any, to which the laws serve any such purpose.

1. The instant cases are to be distinguished from the earlier case of Tileston v. Ullman, 318 US 44 (1943) in that here patients (Doe and the Poes) seek to protect their lives and liberty, and the doctor (Buxton) seeks to protect his liberty and property.

The record is bare of any legislative statement of the object sought to be attained by these laws. When first enacted, in 1879, the prohibition against use of drugs, medicines or instruments for the prevention of conception was an integral part of an overall law against obscenity.[2] In any event these laws must be tested—whatever may have been the situation at the time of their initial enactment—in the light of the knowledge and practice of the medical profession and all other pertinent facts of here and now.

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation." *Brown v. Board of Education of Topeka*, 347 U. S. 483, 492 (1954)

Not only is there no legislative finding to illuminate the purpose of the drastic laws here under consideration and their impact on these appellants, there is also an absence of judicial rationale. The Court below did not attempt to specify the legislative purpose supposedly served by these laws other than by making a general reference to the legislative power "to guard the public morals, the public safety and the public health" (R. 29, 30).[3]

2. Even if tested as an obscenity law today, the statute would be unconstitutional. See Point IV, *infra*.

3. Reference was made to earlier decisions in State v. Nelson, 126 Conn. 412, 26 A 2d 582 (1940) and Tileston v. Ullman, 129 Conn. 84, 26 A 2d 582 (1942) but insofar as a rationale was stated in those decisions it was not reiterated below (except to the extent, see *infra*, p. 22, that the court reiterated *Tileston* in referring to abstinence as an alternative.) (R. 33).

The naked question is therefore presented whether the supposed aim of the state to protect in the most general terms "the public morals, the public safety and the public health," can constitutionally justify the admitted impact of these laws on the appellants and others similarly situated. Obviously, nothing in the Record does so. We shall devote the remainder of this brief to demonstrating with regard to the medical prescription of contraceptives for married persons that there is "in the light of its full development and its present place * * * throughout the Nation" no reasonable basis for concluding that these laws as applied to these appellants bear any relation whatever to "morals," "safety" or "health," and that on the contrary they and their effects are inimical to all of these objectives.

POINT II

There is no reasonable basis in the facts of medical science for the application of the challenged statutes to these appellants.

The Court below referred, as we have seen, to the power of the legislature to "guard * * * the public health" (R. 29, 30), in a context which might suggest that the Connecticut Court thought the Connecticut laws here involved could be defended as "health measures." The fact is, however, that the overwhelming weight of medical authority is to the contrary. The effect of these laws is at one and the same time to deny the benefits of advances in medical science to these appellants and other citizens of Connecticut and to serve no recognized medical aim whatever.

A. The overwhelming weight of medical opinion regards conception control as a vital and necessary aspect of medical care.

It is conceded on the Record in these cases, that pregnancy would be dangerous to the health and welfare of the individual patients involved. There are, of course, many other medical situations in which it is important—often as in the Doe case, quite literally, a matter of life and death—to prevent pregnancy. Medical authorities indicating some of these conditions appear in Appendix A hereto. The dangers which pregnancy may entail in these cases include, in addition to the risk of death, risk of continued or increased physical and or mental illness.

It is also conceded on the Record, in the words of the Court below: "that the use of contraceptives is indicated as the best and safest preventive measure which medical science can offer these plaintiffs" (R. 33).

Nor can it be disputed that the medical profession in Connecticut, in the United States as a whole and throughout the world regards the use of "drugs" "medicinal articles" and "instruments" for the purpose of preventing conception as both necessary and proper. The use and prescription of such drugs and devices has been repeatedly endorsed by the organized medical profession; their use and prescription is recommended without qualification by the leading text writers in the relevant medical specialties; their use and prescription is taught in the leading medical schools throughout the country.[3a] Moreover, their use and prescription is safeguarded by the routine test-

3a. In Appendix G will be found a "Selected Bibliography of Contraception: 1940-1960," listing 344 technical books and articles written by physicians, scientists and scholars in this country and abroad.

ing and approval of the federal Food And Drug Administration and by the Council on Drugs of the American Medical Association.

In Appendix B we have set forth in detail the facts of public record as to the virtually unanimous endorsement by the medical profession of the prescription of contraceptives for married persons in cases of medical necessity such as those here presented. Such prescription and the teaching of the necessary techniques to doctors so that they can make such prescriptions, is called for by the American Medical Association, the American Public Health Association, the American Gynecological Society, the American Neurological Association, the Section on Obstetrics and Gynecology of the American Medical Association, the Section on Nervous and Mental Diseases of the American Medical Association, the American Association of Medical Students and many other national medical groups as well as by a large number of state and regional medical associations, among them the Connecticut State Medical Society.

The pertinent 1937 resolution of the American Medical Association itself—typical of the others set forth in Appendix B—reads as follows:

> "1. That the American Medical Association take such action as may be necessary to make clear to physicians their legal rights in relation to the use of contraceptives.
>
> "2. That the American Medical Association undertake the investigation of materials, devices and methods recommended or employed for the prevention of conception, with a view to determining physiologic,

chemical and biologic properties and effects, and that the results of such investigations be published for the information of the medical profession.

"3. That the Council on Medical Education and Hospitals of the American Medical Association be requested to promote through instruction in our medical schools with respect to the various factors pertaining to fertility and sterility, due attention being paid to their positive as well as to their negative aspects."[1]

In 1931, the Connecticut State Medical Society called for "legalizing the dissemination of contraceptive advice for medical purposes" in such cases as "tuberculosis, heart disease, nephritis and other serious diseases."[2] Subsequently, in 1932, the Connecticut Society adopted a report of its Committee on Public Policy which stated:

"If the occurrence of pregnancy in physically unsuitable mothers is legally recognized as unpreventable, if artificial medical termination of that pregnancy is legally authorized, and the term 'to preserve life' liberally interpreted, if this procedure to 'preserve life' is fraught with risk in itself and is added tax at a time when all stress should be avoided, then sane medical opinion would certainly decree that prevention of such a condition (pregnancy in disease) was immeasurably superior to the corrective procedures; certainly the situation parallels immunization

[1] *The Journal of The American Medical Association*, p. 2218.

[2] *Proceedings of the Connecticut State Medical Society*, 1932.

and prophylaxis in infectious diseases and the periodic health examination as compared to treatment after disease has become established * * *.

"Studies of maternal mortality in Connecticut prove that approximately one quarter of our deaths arise from septic abortions, a second quarter from disease of the heart, kidneys, lungs and metabolic diseases associated with pregnancy. Thus, a large percentage of our annual loss could be obviated by some harmless method of preventing pregnancy in such cases * * *.

"Legal authority should be secured for physicians to exercise their proper duty to protect and procure for their patients the best possible state of health, including—when required—the prevention of conception."[6]

The position of the medical profession is succinctly summarized in the report adopted, in 1946, by the Committee on Public Health of the New York Academy of Medicine which called for "the recognition of medically indicated contraception as an integral and essential part of preventive medicine."[7]

Not only organized medical groups but also medical text writers are united in the opinion that contraception,

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6. *Proceedings of the Connecticut State Medical Society*, 1932, pp. 60-61; 58.

7. *Bulletin of New York Academy of Medicine*, Oct. 1946, p. 555.

(c., "the use of [a proper] drug, medicinal article or instrument for the purpose of preventing conception" is a desirable and necessary medical technique (see Appendix A hereto).

While in 1879, when the statutes herein challenged by the appellants were passed, no medical school gave students any instruction in contraceptive techniques or in medical indications for contraception, by 1933 a survey made by the National Committee on Maternal Health showed that three out of five schools were instructing in medical indications for contraception.[8]

In March, 1942, the Medical Department of the Planned Parenthood Federation of America undertook another survey of the teaching of contraception in the medical schools of the United States and Canada. A report was issued based on replies from forty-six recognized schools giving complete medical courses and representing over sixty per cent of the total number of approved medical colleges in this country and Canada. Forty-two of the forty-six schools answered that instruction was given. Three of the remaining four did not indicate whether it was or not but requested copies of the pamphlet *Techniques of Conception Control* by Robert L. Dickinson, M.D., for the use of their students. Only one school replied specifically that no instruction in contraception was given.[9]

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8. Stone, Abraham, "The Teaching of Contraception in Medical Schools," August, 1942 issue of *Human Fertility*, (Vol. 7, No. 4, 1081). The survey referred to is one Dr. S. A. Knopf of New York made in a questionnaire sent to 75 Grade A medical colleges of the country (64 replies were received).

9. *Ibid.*

A 1946 study in Greater New York showed that every one of the six New York City medical colleges gave some instruction in contraceptive techniques.[10]

The report published in 1947 of a survey of obstetricians and gynecologists throughout the country showed that of 3,381 physicians who responded, 98% approved prescription of contraception for one or more medical reasons.[11]

In 1958 the following statement was issued by the chairmen of the departments of obstetrics and gynecology at the six New York City area medical schools:[12]

10. *Report of Committee on Public Health Relations of the New York Academy of Medicine*, 1946, reprinted by Planned Parenthood Federation of America in *Report on Planned Parenthood Services in New York City* (1946).

In 1947, Dr. Alan Guttmacher reported:

> "Teaching in contraception is being added to the curricula of medical schools. When the replies of those who graduated before 1920 are compared with the replies of those who graduated fifteen years or more later, it is noted that 90 per cent of the graduates before 1920 had no medical school teaching in contraception, this was true for only 27 per cent of those who graduated in 1935 or later."

Guttmacher, Alan F., M.D., March, 1947, *Human Fertility*, Vol. 12, No. 1. The same study also showed that one-third of the respondents to the questionnaire took post-graduate medical training in contraceptive techniques and medical indications for contraception.

11. Guttmacher, Alan F., M.D., *Human Fertility, supra*, note 10. In the summer of 1958 an offer to 14,000 psychiatrists and matrons of a Federation pamphlet entitled *Simple Methods of Contraception: An Assessment of Their Medical, Moral and Social Implications*, brought requests from 40% of those receiving the offer. Over 100,000 copies of this publication were distributed. *Planned Parenthood News*, Fall, 1958.

12. Gordon W. Douglas, M.D., Chairman of Obstetrics and Gynecology, New York University College of Medicine; R. Gordon Douglas, M.D., Professor of Obstetrics and Gynecology, Cornell University Medical College; Louis M. Hellman, M.D., Chairman of

"As teachers of obstetrics and gynecology, we wish to emphasize our conviction that the proper prescription of birth control measures is an important and indeed essential aspect of preventive medicine."[13]

There is thus a clear consensus of medical opinion affirming the medical necessity for the prescription of drugs, articles or instruments where, as in the cases at bar, the physician believes the health of his patients requires such a prescription.

We submit that legislation forbidding resort to remedies the medical profession considers necessary is *prima facie* arbitrary and a denial of due process. The decisions of this Court clearly support this view. *Lambert* v. *Yellowley*, 272 U. S. 581 (1926); *James Everards Breweries* v. *Day*, 265 U. S. 545 (1924); *cf. Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905).

In the *Yellowley* case, the issue was the validity of congressional regulation (not complete prohibition) of liquors for medicinal purposes. This Court upheld the legislation only after noting that, *in the light of divergent opinions among physicians*, the particular restriction there involved could not "be regarded as arbitrary or without a reasonable basis" (272 U. S. at p. 595). It was clearly implicit that, had the profession been united as to the necessity for the prescriptions outlawed in *Yellowley*, the result would

Obstetrics and Gynecology, State University of New York—Downstate Medical Center; Seymour L. Romney, M.D., Chairman of Obstetrics and Gynecology, Albert Einstein College of Medicine; Marvin L. Stone, M.D., Chairman of Obstetrics and Gynecology, New York Medical College; and Howard C. Taylor, Jr., M.D., Chairman of Obstetrics and Gynecology, The Presbyterian Hospital, Columbia-Presbyterian Medical Center. *Planned Parenthood News*, Fall 1958.

13. New York Times, August 31, 1958.

have been different. Mr. Justice Brandeis noted that it was the lack "of any consensus of opinion among physicians" that "made it impossible to say that the provision was an unreasonable and arbitrary exercise of power * * *" (272 U. S. at p. 594). Similarly in the *Everards* case, *supra*, the Court found crucial to the validity of a flat prohibition on malt liquors the fact that "There is no consensus of opinion among physicians and medical authorities that they have any substantial value as medicinal agents" (265 U. S. at p. 562).

In the instant case there is a clear consensus of medical opinion *affirming* the necessity for the prescriptions outlawed by the statutes challenged and both the court below and the appellees have acknowledged this fact. *Cf.* Stone, C. J. concurring in *Skinner* v. *Oklahoma*, 316 U. S. 534, 545 (1942): "A law which condemns * * * all the individuals of a class to so harsh a measure * * * is lacking in the first principles of due process."

B. There is no basis for the position that there is a reasonable medical alternative to the prescription of contraceptives in the instant cases; the alternative relied upon by the court below—abstinence—is not such an alternative.

The court below found that the proscription of accepted medical remedies here involved, although contradictory to "the best and safest preventive measure" called for by the medical profession, was nonetheless constitutionally valid because "there is * * * another alternative, abstinence from sexual intercourse" (R. 33).

In the absence of any legislative finding or statement of purpose we submit that the court below went very far

indeed in premising its finding of constitutionality on the *a priori* assumption that the legislature meant to impose on individuals in the state of Connecticut a penalty at once so drastic and so violative of basic constitutional rights as abstinence from sexual activity in marriage under threat of death or ill health.

Not only is there no basis in the history of the challenged legislation for finding such a legislative purpose, the fact is that medical opinion clearly does not regard total abstinence by married couples as an alternative to safe and tested contraceptive techniques. Abstinence is not a medically acceptable alternative;[14] on the contrary the medical view is that abstinence is harmful with respect to physical and psychological well-being.

This view was aptly expressed by Dr. Robert L. Dickinson, in *Techniques of Conception Control*, (3rd Edition, Williams & Wilkins Co., 1950) at p. 40:

> "In the close relationship of married life the effect of prolonged abstinence is usually harmful to mental health and balance and to the marriage relationship and a risk to fidelity. As a birth control measure for recommendation by the physician abstinence is *negligible* . . . ."

A representative sample of medical opinion on this subject is set forth in Appendix D hereto. It demonstrates

14. We are not here concerned with the concept of abstinence as a desirable state from a philosophical or religious point of view. Obviously there must, under our constitutional system, be freedom for voluntary practice of abstinence, and advocacy thereof. This however in no way detracts from the fact that abstinence is not a medically accepted alternative for married people, and in no way justifies imposition of abstinence in marriage by legislative fiat where pregnancy could be dangerous to life or inimical to health.

that there is no medical basis for enforced abstinence as a therapeutic measure in situations such as those here presented.

C. In the present state of medical science, a physician's failure to prescribe contraceptives in proper cases falls within the area of malpractice.

Thus medical opinion accepts and recommends contraceptive drugs and devices in the treatment of conditions such as those affecting appellants Doe and the Poes and rejects the only alternative—total abstinence—offered by the court below. The advice which appellant Dr. Buxton seeks to give his patients is the advice called for under the prevalent standards of his profession. As a physician, the canons of ethics under which he practices require him to make this advice available to his patients.[15] Moreover, under the common law governing the legal obligation of a physician, Dr. Buxton is also required to advise his patients in accordance with the best techniques generally accepted by his profession.

He must "have the skill normal to the average member of the profession" and "if [he] * * * possesses special skill he must exercise it * * * whenever he * * * realizes or should realize that its exercise is necessary to the reasonable safety of others." *Restatement, Torts*, §299 (d), (f).

A doctor is ordinarily liable for malpractice not only on account of negligent acts of commission, but also on account of negligent acts of omission. Thus, the Kentucky court, in *Walden* v. *Jones*, 289 Ky. 395, 158 S. W. 2d 609

15. See e.g., Section II of the Canons of Ethics of the American Medical Association (*Journal of the American Medical Association*, Special Edition, June 1958).

(1932) held it malpractice, as a matter of law, where a physician failed to apply a prophylactic to the eyes of a newborn child, noting that:

> "* * * it is the recognized practice of the medical profession in communities and neighborhoods similar to that involved in this case to drop silver nitrate in the eyes of a child immediately after delivery." (289 Ky. at p. 397)

Similarly, a New Jersey court found that a physician's failure to make a biopsy to determine the nature of a growth was malpractice. *Coleman* v. *Wilson*, 85 N. J. L. 203, 88 A. 1059 (1913). In Ohio failure to make an x-ray of a fractured leg was held malpractice. *Stoll* v. *Balazs*, 32 Ohio App. 117, 167 N. E. 522 (1929). Also in Ohio it has been said that a physician is liable for malpractice if he neglects to apply such skill and care as would be required to prevent deterioration in or aggravation of the patient's condition. *Craig* v. *Chambers*, 17 Ohio State 253 (1867).

A recent case in the State of Washington demonstrates the scope of the obligation of one who undertakes the responsibility of medical care. In that case [*Kelly* v. *Carroll*, 36 Wash. 2d 482, 219 P. 2d 79 (1950), *cert. den.* 340 U. S. 892 (1950)] a patient who was, in fact, suffering from appendicitis, called in a "drugless healer." The healer, acting on theories which were not derived from medical science, followed a medically erroneous course of treatment, refused to call in a medical doctor, and the patient died. The Washington court, holding the healer liable, ruled:

> "* * * Due regard must be had for the advanced state of medical knowledge at the time of the treatment of

> any human malady, and refuge may not be found in the practices of the medical dark ages * * * It follows that, if there is a reasonable general agreement as to what is the proper medical treatment * * * the question of whether or not the treatment, in a particular case, was correct must be determined by the testimony of expert witnesses from the medical field *who alone are qualified to speak.*" (at p. 493) (Emphasis supplied.)

Thus the Washington court put its finger squarely on a proposition that is crucial to this case, namely, that it is doctors who are primarily qualified to decide upon what constitutes necessary and proper medical treatment. We have already shown above that in the instant cases it is both conceded and established by the facts of public record that the prescriptions banned are the necessary and proper medical treatment. Cf. *United States* v. *31 Photographs etc.*, 156 F. Supp. 350 (S. D. N. Y. 1957) where Judge Palmieri said

> "The Tariff Act of 1930 provides no warrant for either customs officials or this Court to sit in review of the decisions of scholars as to the bypaths of learning upon which they shall tread." (156 F. Supp. at p. 360)

As against the consensus of medical opinion in the field, a doctor today might well be held liable for malpractice if in cases like those of Mrs. Doe and the Poes he did not make available the prescription developed by accepted techniques of modern medicine, namely of contraceptive drugs, medicinal articles or instruments.

No doubt, in Connecticut, the command of the statutes here involved would be successfully raised in bar of any effort to hold a physician liable for malpractice for failure to prescribe a contraceptive in a case medically indicating such a prescription. In other words, Dr. Buxton could not, we believe, be held liable for malpractice in these cases because he was forced by the state not to do his medical duty. But surely the fact that he might well be held so liable elsewhere amply demonstrates the capriciousness of the challenged enactments.[15a]

D. There is no basis in the Record or in the medical facts of public record for any claim that the use of medical contraceptives is or can be harmful.

The overwhelming opinion of the medical profession as reflected in Appendices A and B is, in itself, adequate proof that the use of medical contraceptives is in no way harmful. That drugs, articles and instruments for the prevention of conception are not medically hazardous is also shown by the fact they are endorsed by the medical societies, the textbooks, and the medical schools, cleared for shipment in interstate commerce by the Food and Drug Administration (and as we show below in Point III, legally used and prescribed in at least 48 of the 50 states of the union). Furthermore, on this Record the state has, of course, conceded that the drugs and devices which appellants Doe and the Poes seek the right to use, and appellant

15a. Indeed, quite recently, two members of this Court took occasion to express their views of the importance of expert opinion to legal decision in an area where unlike here, there is not substantial unanimity of opinion. See Smith v. California, 361 U. S. 147 (1959) 165, 172 (Separate opinions of Frankfurter and Harlan, J. J.).

Buxton seeks the right to prescribe are "according to medical science, the best and safest preventive measure for the plaintiffs to follow in order to avoid pregnancy." (R. 29)

As further evidence of virtually unanimous medical opinion, it should be noted that the Council on Drugs of the American Medical Association annually publishes an evaluation of drugs for the guidance of the profession, entitled *New & Non-Official Drugs*. The current (1960) volume, like those in previous years, notes a list of contraceptive devices and drugs, stating "this chapter provides information on preparations for use in the prevention of pregnancy." (p. 426). As recently as May of 1960 the Food and Drug Administration approved as safe a relatively new contraceptive drug, the steroid product Enovid, which had been extensively tested in Puerto Rico, Los Angeles, San Antonio and elsewhere.[16] Medical writers generally affirm the efficacy and freedom from deleterious consequences of drugs and devices for contraception.[17] Ob-

16. New York Times, May 10, 1960.

17. See *e.g.*, Greenhill, J. P. *Office Gynecology*, The Year Book Publishers, Inc. (1959) 7th Ed., p. 304: "It has never been proved that the modern mechanical devices which are used in the vagina have produced pelvic injury, sterility or cancer"; also *Shaw's Textbook of Gynecology*, revised by Howkins, 7th Ed., A. Churchill, Ltd. (1956): "The question of possible ill effects caused by the use of contraceptive methods frequently arises. The Biological and Medical Committee of the Royal Commission on Population reported (Vol. 4, 1950): 'Of the methods now in general use in this country, it can be said with some confidence that, if employed in accordance with instructions, they cause no observable injury to the genital passages' (paragraph 46); and in a later paragraph (52) they summed up: '* * * there is at present no evidence that birth control methods which are generally approved by the medical profession and regarded by them as harmless impair fecundity.'"

To the same effect see Stallworthy, et al., *Problems of Fertility in General Practice*, Cassel, (1953), at 132; Stone & Himes, *A*

viously there is no rational basis for supposing that the drugs and devices used in medical schools and hospitals,[17] recommended by the American Medical Association and approved by the Food and Drug Administration, can be dangerous to the people of Connecticut.

POINT III

Viewed as measures to safeguard public morals there is no reasonable basis for the application of the challenged statutes to these appellants.

If it is assumed that the aim of the laws here involved is to safeguard public morals (another power of the legislature ambiguously referred to by the court below), rather than public health, the statutes prohibiting medical prescription of contraceptives in cases where life and health are involved stand on no better ground. For family limitation in situations of medical need such as those herein presented is approved by every major religious group in

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Practical Guide to Birth Control Methods, Viking (1958), at 78-79, 131; Tietze, *The Condom as a Contraceptive*, National Committee on Maternal Health, (1960), at 39. For medical description and evaluation of the relative usefulness of various available drugs and devices see Dickinson, *Techniques of Conception Control*, Williams & Wilkin Co. (1950).

18. The Roman Catholic Church approves only "natural" methods of birth control. See Point III immediately following. Therefore prescription of certain types of contraceptive devices is not approved in hospitals operated by that Church. However, the basis for this rejection of certain methods is admittedly doctrinal, not medical. Thus as stated in *Ethical & Religious Doctrines for Catholic Hospitals* promulgated by the Catholic Hospital Association of the United States [printed in Kenny, *Principles of Medical Ethics*, The Newman Press (1952), p. 187], "operations, treatments and devices designed to render conception impossible are *morally* objectionable." (Emphasis supplied.)

the United States today and by the public opinion of the community at large. There are some differences of opinion as we shall see, concerning acceptable methods, *e.g.* the Catholic Church rejects some of the methods of birth control acceptable to the medical profession and to other religious groups. All opinion, however, supports the morality of family planning and conception control by one method or another in cases where it is medically called for. This is evidenced wherever one looks for indicia of moral leadership or community standards in contemporary America.

A. All organized religions affirm the need for control of conception by married couples in at least some cases.

1. *Protestant*: The Protestant churches overwhelmingly assert the right of married people to control conception; a substantial segment goes further and affirms conception control to be the moral *duty* of the married individual especially where as in the case at bar medical indications are present.

In 1958, the Archbishop of Canterbury convened a group of theologians who reported in *The Family in Contemporary Society* as follows:

> "The more we understand of our procreative powers, the more responsible we are for the way in which we use them. The price of this generation's knowledge is therefore a heavier burden of responsibility. Christian parents who participate in that knowledge, whether they accept contraception or not, cannot but feel obliged to 'space' and 'plan' their families according to their understanding of themselves, of the well-being of their children, and of the needs of the society of

which they are part. * * * If our conscience will not tolerate, when we know how to prevent it, a torrent of infant deaths, no more should we, with the knowledge we have, encourage an ungoverned spate of unwarranted births.

"If, therefore, governments resolve that it is their duty to encourage (but not to enforce) the adoption of family planning in conjunction with their best endeavors to raise the level of living in other ways, we cannot say that Christians ought to withhold their support. * * *"[18a]

The Lambeth Conference of Bishops of the Anglican Communion, which includes the Protestant Episcopal Church in the United States, in 1958 adopted the following resolution:

"The Conference believes that the responsibility for deciding upon the number and frequency of children has been laid by God upon the consciences of parents everywhere; that this planning, in such ways as are mutually acceptable to husband and wife in Christian conscience is a right and important factor in Christian family life and should be the result of positive choice before God."[19]

This resolution was adopted after the Conference considered both the report on *The Family in Contemporary Society* cited above, and an additional report by a committee of the Conference, consisting of Bishops and Archbishops, which stated:

"The responsible procreation of children is a primary obligation * * * The choice must be made by parents together, in prayerful consideration of their resources,

18a. *The Family in Contemporary Society*, S.P.C.K. (1958), pp. 15-16.

19. *The Lambeth Conference 1958*, S.P.C.K. (1958), p. 157.

> the society in which they live and the problems they face * * * The means of family planning are in large measure matters of clinical and aesthetic choice, subject to the requirement that they may be admissible to the Christian conscience. Scientific studies can rightly help, and do, in assessing the effects of the usefulness of any particular means; and Christians have every right to use the gifts of science for proper ends." [19a]

This resolution was affirmed in 1959 by the National Council of the Protestant Episcopal Church.[20]

A number of outstanding Protestant and Jewish religious leaders declared in 1960:

> "God has placed on married couples the positive duty to determine the number and spacing of their children. * * * As a rational being, with a capacity for making such decisions, man is able to apply experience, to assess right and wrong, to interpret God's will, and, therefore, to determine his own actions. To forfeit this ability is to abuse one of God's most precious gifts." [21]

19a. *Ibid.*, pp. 2:146-7.

20. See press release, "Highlights, National Council Meeting, Dec. 7-9, 1959" issued by Public Relations Division of The National Council of the Protestant Episcopal Church.

21. Statement by the Clergymen's National Advisory Committee of the Planned Parenthood Federation of America, "The Ethics of Family Planning" (1960). This Committee consists of the following individuals: The Rt. Rev. James A. Pike, Bishop, Episcopal Diocese of California, San Francisco, (Chairman); Dr. John C. Bennett, Dean, Union Theological Seminary, New York City; Dr. Oscar A. Benson, Past President, Augustana Lutheran Church, Los Angeles, California; Dr. Roy Burkhart, Minister Emeritus, First Community Church, Columbus, Ohio; Rabbi Maurice N. Eisendrath, President, Union of American Hebrew Congregations, New York City; Dr. Joseph Fletcher, Episcopal Theological School, Cambridge, Massachusetts; Dr. Harry Emerson Fosdick, Pastor Emeritus, Riverside Church, New York City, The Rev. William Genne, Director, Depart-

The 1960 General Conference of the Methodist Church declared that "planned parenthood, practiced in Christian conscience fulfills rather than violates the will of God."[22]

The Council for Christian Social Action, United Church of Christ takes the position that "Responsible family planning is today a clear moral duty."[23]

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ment of Family Life, National Council of Churches, New York City; Dr. Donald Harrington, The Community Church, New York City; The Rev. Duncan Howlett, All Souls Church, Washington, D.C.; The Rev. G. Curtis Jones, Union Avenue Christian Church, St. Louis, Missouri; Rabbi Edward E. Klein, Stephen Wise Free Synagogue, New York City; Dr. J. Oscar Lee, Director, Department of Racial and Cultural Relations, National Council of Churches, New York City; The Rev. Richard E. Lentz, The United Christian Missionary Society, Indianapolis, Indiana; The Rev. Vere Loper, First Congregational Church, Berkeley, California; Dr. Walter G. Muelder, Dean, Boston U. School of Theology, Boston, Massachusetts; Dr. Reinhold Niebuhr, Union Theological Seminary, New York City; The Rev. Dr. Bromley Oxnam, Bishop of the Washington Area, The Methodist Church, Washington, D. C.; Dr. Norman Vincent Peale, Marble Collegiate Church, New York City; Dr. Clarence E. Pickett, American Friends Service Committee, Philadelphia, Pennsylvania; The Rev. Dan M. Potter, Executive Director, Protestant Council of the City of New York; Dr. Alfred M. Rehwinkel, Concordia Seminary, St. Louis, Missouri; Dr. James H. Robinson, Church of the Master, New York City; Bishop B. Julian Smith, Christian Methodist Episcopal Church, Chicago, Illinois; The Rev. Ralph W. Sockman, Christ Church, New York City; The Rev. William B. Sperry, Christ Church, Detroit, Michigan; The Rev. Edward D. Staples, Director, Dept. of the Christian Family, General Board of Education, The Methodist Church, Nashville, Tennessee; Dr. Henry P. Van Dusen, President, Union Theological Seminary, New York City; The Rev. Dr. Hazen G. Werner, Bishop of the Ohio Area, The Methodist Church, Columbus, Ohio; The Rev. Granger Westberg, School of Medicine, and Federated Theological Faculty, University of Chicago; Rabbi David H. Wice, Congregation Rodeph Shalom, Philadelphia, Pennsylvania; The Rev. Paul Wright, First Presbyterian Church, Portland, Oregon; Dr. J. C. Wynn, Colgate Rochester Divinity School, Rochester, New York; Dr. C. T. R. Yeates, Westminster United Presbyterian Church, Des Moines, Iowa.

22. *Report No. 7*, Committee on State of the Church, Adopted May 3, 1960.

23. Statement adopted January 30, 1960; published in 26 *Social Action*, No. 8, pp. 24-27, April 1960.

Protestant religious groups favor use of any safe, effective and medically acceptable methods of contraception. In Appendix C are set forth a number of recent statements made on this subject by these groups.

2. *Jewish*: The Protestant view is shared by the great majority of organized Jewish opinion, which specifically endorses medically directed conception control. One of the most recent expressions of this viewpoint is the statement made in 1959 by the General Assembly of the Union of American Hebrew Congregations:

> "a. We favor the elimination of all restrictions and prohibitions against the dissemination of birth control information and the rendering of birth control assistance by qualified physicans, clinics, and hospitals.
>
> "b. We favor the wider dissemination of birth control information and medical assistance, both by private groups such as the Planned Parenthood Association, and health agencies of local, state, and the federal government as a vital service to be rendered in the field of public health."[24]

Similar statements by other organized Jewish groups appear in Appendix C. They reflect the views of the largest organized bodies of Jewish opinion in the United States today.

A minority Jewish group, representing the Orthodox Jews, approves of conception control for health purposes, but restricts the methods of control to which it extends sanction. This position is set forth in a statement (re-

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24. *Resolutions Passed by the 45th General Assembly, Union of American Hebrew Congregations* (1959) reprinted in *The Churches Speak Up On Birth Control*, published by Planned Parenthood Federation of America, 1960.

printed in Appendix C) issued by the Rabbinical Alliance of America in 1958 when this group joined with other Jewish groups in objecting to any prohibition on the giving of contraceptive advice in municipal hospitals in New York City.[25]

3. *Catholic*: The Roman Catholic position on this subject is expressed in the statement of Pope Pius XII in 1951:

> "We affirm the legitimacy and, at the same time, the limits—in truth very wide—of a regulation of offspring which, unlike so-called 'birth control,' is compatible with the law of God. One may even hope that science will succeed in providing this licit [rhythm] method with a sufficiently secure basis."[26]

A standard Catholic publication on this subject, published under ecclesiastical imprimatur, states that conception may be prevented in order to avoid:

> "Economic burdens, the burden of poverty, of inadequate income, of unemployment which make it impossible for parents to give their children and themselves the food, the clothing, the housing, the education and the recreation they are entitled to as children of God. * * *"[27]

The general consensus of Catholic theologians favors the use of the "safe period" as a means of family planning

25. New York Times, August 12, 1958.

26. Pope Pius XII "Morality in Marriage," Address to the National Congress of the Family Front, *The Catholic Mind*, May 1952, p. 311.

27. Leo J. Latz—*The Rhythm*, Latz Foundation, 6th edition, (1940), p. 147. To the same effect Father Francis J. Connell, "Birth Control, the Case for the Catholic" (1939), 164 *Atlantic Monthly*, 468, 471.

where special circumstances, including financial, medical, eugenic or social conditions are present.[28]

John Cogley, a former editor of *The Commonweal* in a statement approved by the Archdiocese of New York, stated:

> "Strictly speaking, it is artificial birth prevention (by means of contraceptive devices, chemicals, etc.) which the Church condemns as intrinsically evil. 'Natural' birth control—the so-called rhythm theory—is permitted (as the Pope stated) in cases where undue medical or economic hardship makes family limitation imperative." [29]

There is no authoritative determination of the extent to which the approved Roman Catholic method of conception control may be restricted by the laws at issue here. While reliance on the "safe period" method (based on the theory that sexual intercourse may be restricted to infertile periods) [30] does not necessarily involve a drug, medicinal article or instrument for the purpose of preventing conception, in recent years various devices have been developed for the purpose of seeking to make this method more

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28. See J. A. Ryan, "The Moral Aspects of Periodic Continence." *The Ecclesiastical Review* LXXXIX (1938).

29. *The Churches Speak Up On Birth Control*, Planned Parenthood Federation of America, 1960.

30. There is substantial medical authority questioning the reliability of this method. See *e.g.*, data on research of Drs. Stone, Dickinson and Bryant, in article by Dr. D. D. Bromley "Birth Control" 110 *Journal of the American Medical Association*, 257-261; Decker & Decker, *Practical Office Gynecology*, F. H. Davis (1956), p. 320, Dickinson, *Techniques of Conception Control*, 3rd ed., Williams & Wilkins (1950); Fleck, Snediker & Rock, "The Contraceptive Safe Period," 223 *New England Journal of Medicine*, 1005 (1940); Guttmacher, *Babies by Choice or by Chance*, (Doubleday, 1959).

reliable.[31] Some of these devices may well be regarded as "drugs, medicinal articles or instruments for the purpose of preventing conception," in which event, of course, both the medically approved methods and the method chosen by the Catholic Church would be banned by the laws here at issue.

B. State and privately sponsored medical prescription of contraceptives is legal and widespread throughout the rest of the United States.

1. Legality

We have prepared a map (Appendix E) showing the pattern of state laws relating to contraception throughout the country. Connecticut alone has legislated with reference to the "use" of contraceptives and has construed its statute to prohibit use by all persons under all circumstances. Massachusetts has imposed an apparently equally absolute ban on sale, display and prescription. The remaining 48 states at the very least permit the prescription by doctors of contraceptives, "natural" or "artificial," in cases of medical necessity such as those here

31. Several types of "rhythm" calendars have been put on the market as aids to women seeking to ascertain a "safe" period. [For actions taken by the FTC against claims made for some such products, see In the Matter of Scientific Instruments, Inc., Fed. Trade Comm., File No. 1-10400 (1940); In the Matter of Edwin Ries, doing business as The Health Calendar Company, Fed. Trade Comm., Stip. No. 02656 (1940).] In State v. Nelson, 126 Conn. 412 26 A. 2d 582 (1940) the Connecticut Supreme Court of Errors indicated that it did not regard calendars as within the statutory ban. However, since the decision in the *Nelson* case new devices have come into vogue for use incidental to the rhythm method, some of which are applied to or in the body. These devices may well be covered by the statute. Among these are vaginal thermometers, chemicals to test urine and vaginal tampons (for the purpose of determining presence of a substance which stimulates ovulation). One such tampon—Testape—has been approved by *The Grail*—The Magazine of Catholic Family Living (Fall, 1958).

presented. A large number of jurisdictions have made no effort to regulate or control contraceptive devices—thus leaving the public to the guidance of medical and spiritual leaders a majority of whom, as we have seen, call for their use. Another large group of states limits the distribution of contraceptives to medical or pharmaceutical channels. Others merely forbid commercial advertising of contraceptives. Some states, interested in safeguards rather than prohibitions, provide for inspection and quality control. The few state laws which are not expressly limited in their prohibitions have been interpreted—judicially or administratively—to permit medical prescription of contraceptives, as has the federal law in the field. The federal Comstock laws (also prohibitions absolute on their face and passed as "obscenity" legislation at roughly the same time) have been consistently interpreted to permit mailing and interstate and foreign shipment from and to physicians and on their prescription of "things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients * * * which in many cases is advocated by such a weight of authority in the medical world."[32]

2. *Availability of Contraceptive Services*

The ninety-six Planned Parenthood Federation of America affiliates maintain 146 centers for the dissemination of medical advice on family planning (as described in Appendix F). According to a survey published in 1957, the total number of centers throughout the country to

32. United States v. One Package, 86 F. 2d 737 (2d Cir. 1936) at 739-40; see also United States v. Nicholas, 97 F. 2d 510 (2d. Cir. 1938); Youngs Rubber Co. v. C. I. Lee & Co, 45 F. 2d 103 (2d Cir. 1930); Consumers Union of United States v. Walker, 145 F. 2d 33 (D. C. Cir. 1944).

which patients were referred for medical services in the contraception field was 546.[33]

In some communities state or city health agencies or institutions are a primary source of advice and information. Contraceptive services are part of the official public health programs of at least seven states: Alabama, North Carolina, South Carolina, Florida, Georgia, Mississippi and Virginia.[34]

Federal funds for the support of such state health work in the birth control field are available under the policy directive issued by the Surgeon General of the United States in 1942 which stated:

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33. *Directory of Clinic Services*, Planned Parenthood Federation of America (1957).

34. Norton, J.W.R., M.D., "A Health Department Birth Control Program," 29 *American Journal Of Public Health*, 253 March 1939. In this article Dr. Roy Norton reports on the progress of the North Carolina State Board of Health Program after 18 months of experience:

> "A health department birth control program is an essential part of the maternity and infant public health service and the better selection of pregnancy risks should favorably affect maternal and infant morbidity and mortality conditions in the counties."

See also Norton, *et. al.*, "Twenty-one Years Experience With a Public Health Contraceptive Service," 49 *American Journal of Public Health*, 993, August 1959, in which Dr. Norton states:

> "The contraceptive service has definitely been a factor in the improvement of maternity and child health in the state."

The experience of some of the state programs was summed up in a 1958 symposium reported in Calderone, Ed., *Abortion in the United States* Hoeber-Harper (1958), pp. 154-157. Dr. Mack I. Shamholtz, State Health Commissioner of Virginia, reported that his state sponsored 180 general maternity clinics, each offering postpartum advice on contraception where medically indicated (p. 154). See also statements by Dr. Helen W. Bollhouse, Director of the Division of Maternity and Child Health, Department of Public Health, Atlanta, Georgia (p. 155); Dr. Hilla Sheriff, Director of the Division of Maternity and Child Health, State Board of Health, South Carolina (p. 155); Dr. D. V. Galloway, Director of State Board of Health, Mississippi (pp. 155-6).

"'Should a State Department of Health decide on its own initiative to undertake a child-spacing program in accordance with the health laws of the state, the Public Health Service would give the proposal the *same consideration as would be given to any other proposal in connection with the health program of the state.* * * * Federal funds allotted to the states under the provision of Title 6 of the Social Security Act and the Venereal Diseases Act may be used for the purpose of carrying on planned parenthood programs by the state and local health departments.'" [35] (Emphasis added.)

The opinion of public health officials throughout the country is reflected in the resolution adopted by the Governing Council of the American Public Health Association in 1959, as follows:

"1. Public health organizations at all levels of government should give increased attention to the impact of population change on health.

"2. Scientific research should be greatly expanded on

(a) all aspects of human fertility;

(b) interplay of biological, psychological, socio-economic factors influencing population change.

"3. Public and private programs concerned with population growth and family size should be integral parts of the health program and should include medical advice and services which are acceptable to the individuals concerned.

35 Circular to District Offices, Federal Security Agency, U. S. Public Health Service, Feb. 1942.

"4. Full freedom should be extended to all population groups for the selection and use of such methods for the regulation of family size as are consistent with the creed and mores of the individuals concerned." [36]

It has already been noted that contraceptive articles are tested and evaluated by the Food and Drug Administration, so that these articles, outlawed in Connecticut, move freely in interstate commerce. The armed services, as is well known, issue contraceptive devices to military and naval personnel and the civilian side of the federal government complemented this policy during the war when the War Production Board issued an order in January 1942 [List C Supplementary Order No. M 156, as amended] permitting manufacture of contraceptives for men and women at 100% of the 1940-41 production level.[37]

At the present time, the National Institute of Health [42 U. S. C. §203 (1944)] has made grants for 32 projects for medical research in areas related to fertility, sterility and human reproduction. It was recently reported that the National Institute would consider applications for research designed to make the "rhythm" method more reliable.[38]

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36. 49 *American Journal of Public Health*, No. 12, Dec. 1959.

37. Referred to in Tileston v. Ullman, 129 Conn. 84, 26 A. 2d. 582 (1942), dissenting opinion at p. 96.

38. N. Y. Times, January 16, 1960. The National Institute of Health statement was in response to a query which followed a broadcast by Rev. James A. Pike, Episcopal Bishop of California, who had stated on January 14, 1960, on "The Population Explosion" a Columbia Broadcasting System television program: "Let our government, as it has done in regard to death control * * * turn its attention * * * to a crash program to improve all methods of family planning and * * * to make more reliable, by research, the rhythm method, a program which Pope Pius XII, himself, has called for * * *." *C.B.S. Reports*, "The Population Explosion," January 14, 1960.

C. "Contemporary Community Mores" and Medical Prescription of Contraceptives

As we have pointed out above, the Connecticut ban on medical prescription of contraceptives in cases of medical need such as those here presented traces its origin to the Connecticut "obscenity" law. This Court has recently held that "contemporary community mores" are relevant in the determination of obscenity. *Roth* v. *United States*, 354 U. S. 476 (1957). We have seen above what the mores are with respect to the questions herein presented in the field of medical practice, religious principles, and official state and local attitudes and activities. The views and opinions of the general public which constitutes the "community" may also be of interest.

According to a poll reported by Dr. Alan F. Guttmacher in 1947, 93% of the obstetricians, gynecologists and general practitioners polled stated that their patients requested contraceptive advice. 62.2% of the physicians reported that they were asked for such advice frequently and 30.5% occasionally.[39] Dr. John Rock, another eminent physician, has stated that 90% of the married population in the United States uses some method of contraceptive control.[40]

Public opinion polls on the subject of family planning even in the absence of medical need have been conducted with considerable frequency. Most recent is one taken by Dr. Gallup in 1960 which found that across the country

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39. "Conception Control and the Medical Profession," *Human Fertility*, 12:1, March, 1947.

40. "Medical and Biological Aspects of Contraception: The Scientific Case Against Rigid Legal Restrictions on Medical Birth Control Advice," *Clinics*, 1:1598, April 1943.

72% of the populace answered "Yes" to the question "Do you think birth control information should be available to anyone who wants it?" Only 14% answered "No."[41]

Fortune magazine has conducted a number of polls. In 1943, 84.9% answered "yes" to the question "Do you believe knowledge about birth control should be made available to all married women?"[42]

The 1960 Gallup Poll also found that 54% of Americans favored extension of our government's aid to other nations for the purpose of making birth control available.[43] This question came to public notice after the report[44] to President Eisenhower by the President's Committee to Study the United States Military Assistance Program, popularly called the "Draper Committee."

A scholarly study conducted by the University of Michigan and the Scripps Foundation for Research in Population Problems showed that nearly five out of six white couples of a national cross section sample had taken steps to limit the number of their children, and another 7% said that they intended to take such steps after they had one or more wanted children. The report stated:

> "Family limitation is now almost universally approved and is practiced widely and effectively . . .

41. New York Herald Tribune, Feb. 18, 1960.

42. *Public Affairs Pamphlet*, No. 136, Planning Your Family, by Herbert Yahraes, 1953. Fortune reported that among Catholic women 69% answered "yes" (*ibid.*).

43. 29% were opposed; 17% had no opinion. New York Herald Tribune, Feb. 18, 1960.

44. Report to the President on Economic Assistance Programs and Administration, July 13, 1959.

> A significant minority of couples have more children than they want * * *. It seems probable that the number of couples in this unhappy position will decrease in future years, in part because research will improve methods of limitation, but also in part because a rising general level of education will provide more couples with the personal qualifications and the information required for effective family planning." [45]

It is noteworthy that the 1960 White House Conference on Children and Youth issued the following resolution:

> "We recommend that planning for the size of families is desirable in order to relieve the deprivation of children. Thus, facilities and programs on a local public or private basis should be available to married couples to provide medical advice and services for child spacing. These should be consistent with the creed and mores of the families served." [46]

Similarly, in 1959, a study prepared for the Foreign Relations Committee of the Senate by The Stanford Research Institute concluded:

> "* * * There is nothing to suggest complacency in the face of the world's threatening population and production problems * * * Population control will become imperative * * * Current scientific developments indicate that a radical advance in techniques, such as a safe, effective and inexpensive oral contraceptive, could soon be available if the comparatively small

45. Freedman, Whelpton and Campbell, *Family Planning, Sterility & Population Growth*, McGraw-Hill, 1959 at p. 401. This study also reported that 88% of the Protestants included in the study adopted birth control measures compared to 70% of the Catholics.

46. New York Times, Jan. 24, 1960.

amount of research now under way in this field were stepped up * * * *"[47]

It is apparent that mid-twentieth century American "community mores" are not offended by family planning. On the contrary, most Americans deem conception control normal and proper and a great many consider it a moral obligation. We venture to suggest that most Americans would consider offensive the notion that the state should prohibit those of its married citizens who have urgent medical need for contraceptives from using them, and as a necessary incident thereto, prohibit their physicians from following the mandates of their profession.

POINT IV

Under the relevant due process tests the challenged statutes are arbitrary and unreasonable deprivations of appellants' life, liberty and property in violation of the 14th Amendment.

A. There is no reasonable basis for the challenged legislation.

On the basis of the foregoing, we submit it is clear that the challenged statutes find no reasonable basis in the facts of record or the facts of medical science, religious position or contemporary community mores. Even if, however, we were to concede, *arguendo*, that the statutes do serve in some degree "the public morals, the public safety and the public health," they would still be unconstitutional under other relevant due process tests.

47. "Possible Non-Military Scientific Developments and Their Potential Impact on Foreign Policy Problems of the U. S." (1959).

B. The challenged legislation is not "reasonably restricted to the evil with which it is said to deal."

The absolute prohibition in these Connecticut statutes of the use by and medical prescription for married persons of contraceptives under any and all circumstances regardless of their medical need, is a fiat not "reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U. S. 380, at p. 383 (1957). The means are "greatly in excess of the need"; Holmes J. in *Engel* v. *O'Malley*, 219 U. S. 128 at p. 136 (1908). See also *Schneider* v. *Town of Irvington*, 308 U. S. 147, 162 (1939), invalidating an ordinance requiring a permit for distribution of leaflets: "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw paper on the streets."

States other than Connecticut concerned with indiscriminate distribution of contraceptives—or with their intended market or their quality—have found it possible to enact various regulations to protect the public health, safety and morals without going to the extreme of prohibiting the medical profession from doing its duty in this field. See Appendix E hereto. Similarly, with respect to the federal government, neither the courts, the Food and Drug Administration, the Federal Trade Commission nor the Post Office Department have found it necessary to impose a total prohibition on essential medical practice. Inspection, licensing, official testing, legislative proscription of dangerous methods, compulsory channeling of distribution via the medical profession and/or the drug trade, all these were available to the legislature of Connecticut. But the Connecticut legislature chose instead to "burn down the house to roast the pig," a choice not constitutionally available to it under *Butler* v. *Michigan supra*.

C. General statutes impinging on life and liberty such as those challenged herein may not be applied as in the instant cases to impose excessive hardships on particular individuals.

As far back as *Jacobson* v. *Massachusetts*, this Court said:

> "Before closing this opinion, we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised by the legislature, or by a local body acting under its authority, may be exerted in such circumstances or by regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. 'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of that character. The reason of the law in such cases should prevail over its letter.' *United States* v. *Kirby*, 7 Wall. 482; *Lau Ow Bew* v. *United*

States, 144 U. S. 47, 58. Until otherwise informed by the highest court of Massachusetts, we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination or that vaccination, by reason of his then condition, would seriously impair his health or probably cause his death. No such case is here presented." 197 U. S. 11 (1905), at pp. 38-39.

The situation hypothesized by this Court in *Jacobson v. Massachusetts* is actually presented in these cases. Since the lives or health of the appellants Doe and the Poes will be thus jeopardized, the Connecticut statutes here under review are, we submit, clearly unconstitutional as to them. Cf. *Skinner v. Oklahoma*, 316 U.S. 534, 541, (1942): "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."

D. The challenged statutes unreasonably prohibit the best and safest medical solutions of appellants' problems; they foster, however, the use of techniques and articles which are dangerous, unreliable and indiscriminate.

It is conceded on the Record that the appellant Buxton is prohibited from prescribing and the appellants Doe and the Poes are prohibited from using methods of contraception which are "the best and safest preventive measure" available to meet their particular and very real health problems (R. 33).

What does that leave as alternate solutions of their medical problems? Abstinence, which, as shown *supra*

pp. 22 to 24, and in Appendix D, is, in the opinion of the majority of the medical profession, no alternative at all. Presumably, it might also leave rhythm. However, rhythm is simply partial abstinence, i.e., the refraining from sexual intercourse at certain specified periods, and as suggested in footnote 30, *supra*, is not a practicable alternative either. Furthermore, rhythm devices to be applied in and to the body, such as thermometers, tampons, chemicals and the like, may well fall within the ban of the Connecticut statutes. (See *supra* pp. 36-37)

And while Connecticut forbids all use of "drugs, medicinal articles or instruments" for the prevention of conception, regardless of medical need, it allows the drastic and more dangerous medical solutions of abortion and sterilization. (General Statutes of Connecticut, Sections 17 to 19; Sections 53-29 [Revision of 1958]; Calderone, *Abortion in the United States*, Hoeber-Harper (1958); cf. *Report of The Royal Commission on Population*, H. M. S. O. (1949), p. 159, where it is stated:

> "Our survey of the history of family limitation leaves us in no doubt that if these methods [use of drugs, medicinal articles and instruments] were not available, other means would be used and some of them, e.g., criminal abortion, the prevalence of which is even now, alarmingly high, are very undesirable."[48]

48. See Calderone, *Abortion in the United States* (*supra*, note 34), at p. 188:

> "Taking into account the probable trend of the abortion ratio since the interwar period, a plausible estimate of the frequency of induced abortion in the United States could be as low as 200,000 and as high as 1,200,000 per year, depending upon the assumptions made as to the incidence of abortion in the total population as compared with the restricted groups for which statistical data are available, and upon the assessment of the direction and magnitute of bias inherent in each series of data.

Moreover, it is in any event impossible to prevent people in desperate need from using any "drug, medicinal article or instrument" they can lay their hands on and believe may be efficacious to prevent conception: syringes, vaginal suppositories, jellies and foam powders, condoms etc. There is a demand for any device—those which are medically accepted, also those which are not considered medically safe or reliable. Many articles are capable of a contraceptive use and another use such as feminine hygiene or prevention of venereal disease. Presumably, in cases involving such products the prosecution must prove that the use was to prevent conception and not for the purpose of preventing disease, notwithstanding the fact that the *use* is identical in both cases. Compare *Commonwealth* v. *Corbett*, 307 Mass. 7, 29 N. E. 2d 151 (1940); *Commonwealth* v. *Werlinsky*, 307 Mass. 608, 29 N. E. 2d 150 (1940).

Thus what we have here is a ban only on the use of drugs, medicinal articles and instruments which doctors prescribe expressly for contraceptive purposes for married persons in instances of medical need. For other purposes, anyone in Connecticut can as a practical matter use any

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There is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency."

See also Memorandum from Zad Leavy, Deputy District Attorney to Joseph B. Busch, Jr., President Association of Deputy District Attorneys, Los Angeles County, re "Proposed Legislation Amending Abortion Statutes, May 2, 1960:"

> "There will be in 1960 in excess of one million illegal abortions in the United States with probably more than 5000 deaths as the result of abortions induced by unskillful hands. One out of every four or five pregnancies in this country will be terminated unlawfully."

drug, medicinal article or instrument he pleases. A clearer instance of unreasonableness of classification would be hard to find. And whereas the presecription of contraceptives by physicians for married persons in situations of medical need can be supervised, checked and controlled, other non-medical contraceptives such as rhythm devices and those mentioned above are freely available to all regardless of age or marital status. The statutes, in other words, serve only to prohibit the prescription by doctors of reliable advice and materials for their married patients in cases of medical necessity—although such prescription is clearly in the direction of "public health, safety and morals" which they are supposed to serve.

The decision below commands a non-medical solution of a medical problem, and is thus *prima facie* arbitrary and unreasonable.

Conclusion

We submit that the Connecticut statutes, as interpreted below and as applied to the appellants, bring before this Court a situation to which the terms "arbitrary and capricious" if applicable anywhere are *par excellence* applicable.

The only justification for depriving these appellants, on the one hand of the means to preserve health and happiness and on the other of the right to practice the healing arts, is the vague and unsubstantiated reference below to "public health," "public safety" and "public morals." We doubt whether this Court has often before been asked to sanction such harsh blows to human rights on so flimsy a justification (*Cf. Skinner* v. *Oklahoma, supra*).

There is no factual support for the notion that the deprivation caused by these laws contributes to public health, safety or morals. On the contrary, these laws, as applied to these appellants, and others similarly situated can lead only to deterioration of health and demoralization of standards. There is no reasonable relation between the ban on medically prescribed contraceptives for married people and any proper public purpose. These statutes are thus "lacking in the first principles of due process" (Stone C. J. concurring in *Skinner* v. *Oklahoma*, *supra*).

And even if there were no "limits to which the presumption of constitutionality can be pressed" (*Ibid*)—so that in spite of the known facts some legislative purpose were assumed, it would nevertheless be obvious that whatever the assumed purpose, it could not justify the cost in human life and liberty here involved. It is difficult to conceive of any circumstances which would justify the result caused by these laws. *Cf. Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957). Regardless of whether the "public health" or the "public safety" or the "public morals" is said to be at stake, it is capricious to prohibit doctors from prescribing contraceptives for married persons whose health and lives are in jeopardy and to prohibit such persons from using the prescribed articles.

The cost of these laws in human freedom, health and dignity cannot be defended. We submit that, if the concept of due process of law as an expression of "civilized standards of law" [Frankfurter, J., concurring in *Malinski* v. *New York*, 324 U. S. 401 (1945), at p. 414] has any

meaning whatever, it must apply to strike down the laws of Connecticut here at issue.

Respectfully submitted,

MORRIS L. ERNST
HARRIET F. PILPEL
285 Madison Avenue
New York 17, New York
Attorneys for Amicus Curiae

GREENBAUM, WOLFF & ERNST
JULIA PERLES
NANCY F. WECHSLER
Of Counsel

APPENDICES TO BRIEF OF THE PLANNED PARENTHOOD FEDERATION OF AMERICA, INC. AS *AMICUS CURIAE*

APPENDIX A

II. Opinions of Medical Text Writers and Authorities as to Medical Necessity for Contraceptive Measures

Adair, Fred L. M.D. Professor of Obstetrics and Gynecology and *Whitacre, Frank E.* M.D. Assistant Professor of Obstetrics and Gynecology, both at Rush Medical School, University of Chicago—*Tuberculosis and Reproduction* (Journal Michigan State Medical Society, Jan., 1932):

"There seems to be general agreement that pregnancy is not desirable in the woman with tuberculosis and should not be permitted for two or three years after cure. This means the use of contraceptive measures."

Beck, Alfred C. M.D. Professor of Obstetrics and Gynecology, State University of New York, College of Medicine at New York City; Professor of Obstetrics and Gynecology, Long Island College of Medicine, Obstetrician and Gynecologist-in-Chief, Long Island College Hospital—*Obstetrical Practice* (Baltimore, Williams and Wilkins, 2nd edition, 1939):

(p. 563): "At one time mitral stenosis was so feared that women with this lesion were warned to remain single. If they married the prevention of conception was recommended * * *. While pregnancy increases the risk in all women who have had a previous break in compensation, the risk is so great in those who are unable to stand the strain of every day activity that they should not become pregnant, and if they do, therapeutic abortion is indicated.

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"When congestive failure occurs in the course of pregnancy the same reasoning should be followed."

(p. 574): "Women with severe nephritis should receive instructions in the use of contraceptives. If pregnancy occurs, therapeutic abortion and sterilization are indicated."

(p. 576): "Following nephrectomy for renal tuberculosis three years should elapse before pregnancy is permitted."

Berkeley, Sir Comyns M.A., M.C., M.D., F.R.C.P., F.R.C.S., M.M.S.A., F.C.O.G. Consulting Obstetric and Gynaecological Surgeon to the Middlesex Hospital, the City of London Lying-in Hospital and the Chelsea Hospital for Women; Consulting Gynaecological Surgeon of the Radium Centre, L.C.C.; Chairman of the Central Midwives Board; Examiner in Midwifery and Diseases of Women to the Universities of Birmingham, Bristol, Cambridge, Leeds, Liverpool, London, Manchester, Oxford, Sheffield, Wales National School, Glasgow, St. Andrews—*Midwifery by 10 Teachers* (London, Arnold & Company, 6th edition, 1938):

(p. 185): "Heart disease. Should the patient again become pregnant? This depends upon the class to which the patient has been attributed. If the patient insists upon another child, an interval of at least two years, should, so far as possible, should be insisted upon. Meanwhile contraceptives should be used."

Bland, P. Brooke M.D. Emeritus Professor of Obstetrics, Jefferson Medical College; Consulting Obstetrician, Jefferson Medical College Hospital, Phila., Pa. and *Montgomery, Thaddeus L.*, M.D. (Clinical Professor of Obstetrics, Jefferson Medical College, Phila., Pa.)—

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Practical Obstetrics (Philadelphia, F. A. Davis Company, 3rd edition, 1939):

(p. 171): "Patients with grave valvular heart disease, especially mitral or aortic stenosis, should not marry. If married, pregnancy should be avoided by the practice of contraceptive methods."

(p. 158): "In the face of known kidney disease with or without hypertension the inception of pregnancy should be avoided * * *.

"In cases of evident nephritis with vascular lesions it is questionable whether the obstetrician has done his full duty to the patient by simply terminating the pregnancy, for the situation is likely to recur more acutely with another pregnancy. For this reason it would appear quite rational to instruct such patients in contraceptive measures and warn them against the further occurrence of pregnancy."

British Medical Association—Report of Committee on Legal Aspects of Abortion, 1936:

(p. 23): "The Committee is unequivocally of opinion, that within the range of those medical conditions which render pregnancy dangerous to life and health, the avoidance of pregnancy is to be encouraged as a procedure of double value, in that it protects the woman against the risks to which pregnancy exposes her and at the same time it eliminates the occasion for therapeutic abortion and the temptation to adopt unlawful methods."

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Decker, A., Clinical Professor of Gynecology & Obstetrics, New York Medical College, New York Polyclinic Medical School & Hospital; *Decker, W. H.*, Assistant Clinical Professor of Obstetrics & Gynecology, New York University College of Medicine, Attending Gynecologist Bellevue & University Hospitals. *Practical Office Gynecology* (Philadelphia, F. A. Davis, 1956):

(p. 316): "The physician should determine the patient's physical condition and general health, and the development of her pelvic and sexual organs in relation to her ability to conceive and successfully bear a child. He should inform her truthfully concerning these findings lest a marriage be consummated when there are chronic disorders that might endanger the life of the mother or child should pregnancy occur. It is understandable too that many couples, for economic reasons or when a period of time is desired for sexual and personality adjustments, may wish to postpone pregnancy."

Dickinson, Robert Latou, M.D., F.A.C.S., Former Clinical Professor Obstetrics and Gynecology, Long Island College Hospital; former President American Gynecological Society; American Gynecological Club; New York Obstetrical Society; Brooklyn Gynecological Society and Brooklyn Hospital staff; Vice President Clinical Congress of Surgeons; Lt. Col. Medical Advisor to General Staff Washington, 1918-1919; Senior Consultant Birth Control Clinical Research Bureau; Secretary Committee on Maternal Health. *Control of Conception: Present and Future* (5 Bulletin, New York Academy of Medicine, 413-434, May, 1929):

"The question [of contraception] involves every mother after delivery, who requires instruction in measures to take to avoid pregnancy until she is fit to bear another

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child; it includes every convalescent from operation or real illness and every woman worn down by imperative overwork. And the doctor who does not help to prevent the start of a pregnancy that he is persuaded will run his patient down further: how does he excuse himself for a neglect of ordinary health protection? * * *"

Dickinson, Robert Latou, M.D. (see above) *"Control of Conception"* (Baltimore, Williams & Wilkins, 2nd Edition, 1938):

(p. 352): "Three great strides of medicine are towards:

Control of pain in labor and operation;
Control of infection in labor and operation;
Control of communicable disease.

"These three advances made in the face of opposition and indifference on the part of the organized profession, are now its common pride and glory.

A fourth control, control of conception, needed to safeguard life and health and happiness * * * will take its place of honor with these others. Courage and wisdom were required to restrain the forces of disease and death. A greater courage and a higher wisdom are called for within our profession to undertake a guiding part in the control of life."

Douglas, R. Gordon M.D. Assistant Professor of Obstetrics and Gynecology, Cornell University Medical College, New York. *Hypertension, Nephritis and the Toxemias of Pregnancy* 34 American Journal Obstetrics and Gynecology, 565-575, October, 1937:

"Prevention of pregnancy in patients with definite evidence of cardio renal vascular disease is not only justifiable but is an essential part of our obstetric care of patients."

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Eastman, Nicholson J. M.D. Professor of Obstetrics, Johns Hopkins University: *The Aims of Birth Control and Their Place in Preventive Medicine*, New International Clinics 1: Series 5, 1942:

(pp. 274-5): "*Repeated Toxemias of Pregnancy.* * * * After a patient has had a hypertensive toxemia of pregnancy, no further conception should be permitted until all traces of the complication, including even slight hypertension, have disappeared. At an early date in the puerperium, the patient should be instructed in contraceptive technic and its importance in her particular case stressed. After all traces of the previous toxemia have disappeared, another conception may be permitted provided that both husband and wife understand that there is about one chance in three of recurrence and, moreover, that interruption of the pregnancy at one stage or another may possibly become necessary in order to safeguard the woman's health."

(pp. 276-7): "*Rheumatic Heart Disease.* * * * if there are signs or history of failure or of auricular fibrillation, pregnancy increases the risk almost three-fold.

"In view of these facts it would seem logical to interdict pregnancy in all women * * * who suffer from auricular fibrillation; * * * this is a rule which should seldom be broken."

(pp. 279-280): "*Diabetes Mellitus.* * * * These dangers faced by the diabetic mother are clear evidence that stringent family limitation is essential for her safety. The degree to which the family is curtailed will depend, of course, on the individual case and on such factors as the severity of the disease, the ardency of the woman's desire for a child, and on her ability to co-operate with the physician. In general, however, one or two children

would seem to represent an ample risk for most diabetic women."

(pp. 280-284): "*Chronic Pyelitis.* * * * It is the accepted rule, therefore, that all such patients must use contraceptive measures postpartum, not only until urinary sterilization has been achieved but until the urinary tract has remained pus- and bacteria-free over a two-year period."

(p. 281): "*Previous Cesarean Section.* With the increasing use of Cesarean section, the integrity of the uterine scar in subsequent pregnancies is rapidly becoming one of the most common—as it is certainly one of the most difficult—problems * * * The frequency with which cesarean section scars rupture in later pregnancies and labor has been variously estimated * * * The cesarean section scar, therefore, is never to be trusted completely * * * This danger is usually met by tubal sterilization after the second or third operation, but occasionally circumstances will arise in which the physician will * * * protect such a patient from further pregnancies by vaginal occlusive technics."

(p. 283): "*Great Multiparity.* * * * Because of the high maternal and fetal mortality associated with bearing more than eight children and in view of the transcendant value of such a mother to her family, women of this parity should be urged to use contraceptive measures on the sole basis of great multiparity. If contraception fails or if husband and wife both desire it, sterilization is justifiable."

(p. 300): "*Economic Distress.* * * * The question has been asked * * * whether it is sound preventive medicine to allow baby after baby to be born into homes where poverty exists * * * it is the reviewer's opinion that dire economic distress may very truly constitute a medical

reason for family limitation * * * it is believed that birth control will find some of its greatest usefulness in this field —and if you will, on strictly medical grounds."

(p. 302): "* * * the medical indications for contraception are manifold and urgent. Its widespread employment promises a major reduction in loss of life and suffering; and it deserves, accordingly, an important place in medical practice."

Eden, T. Watts, M.D., C.M., F.R.C.P., F.R.C.S., F.C.O.G. Consulting Gynaecologist, Charing Cross Hospital and Chelsea Hospital for Women. Consulting Obstetrics Surgeon, Queen Charlotte's Lying-in Hospital, and *Lockyer, Cuthbert*, M.D., B.S., F.R.C.P., F.R.C.S., F.C.O.G. Consulting Gynaecologist Charing Cross Hospital; Samaritan Hospital; Royal Northern Hospital; National Hospital, Queens Square—*Gynaecology for Students and Practitioners* (London, 1935):

(p. 210): "It is an accepted fact that under certain circumstances a woman incurs the possibility of grave danger to life or health should she become pregnant. Chronic renal disease, active pulmonary tuberculosis, and serious cardiac lesions are, for example, generally regarded as being adversely influenced by the pregnant state, and should a gestation occur, therapeutic abortion is advocated and practiced and has legal sanction. * * *

"Birth control in its medical applications is an important aspect of preventive gynaecology * * *".

"*Indications.* The giving of contraceptive advice will naturally depend largely upon the individual views of the practitioner consulted. In general the indications include all those conditions where should pregnancy occur, therapeutic abortion would be performed, e.g., serious chronic

lesions involving the heart, lungs or kidneys, grave degrees of anaemia, co-existing malignant disease, certain mental states, etc. In addition it may be expedient to prevent temporarily, as in the case of high fertility and too rapidly repeated pregnancy, during complete convalescence from various diseases or after operations, e.g. Caesarean section and for prolapse of the pelvic viscera. This list, whilst in no sense complete, will indicate the type of problem with which the practitioner is commonly presented, and unless proper advice is given the outcome may be undesirable."

Greenhill, J. P., B.S., M.D., F.A.C.S., F.I.C.S. Attending Obstetrician and Gynecologist, Michael Reese Hospital; Professor of Gynecology, Cook County Graduate School of Medicine; Attending Gynecologist, Cook County Hospital; Editor of the "Year Book of Obstetrics and Gynecology; author of "Obstetrics in General Practice," "Surgical Gynaecology" and "Principles and Practice of Obstetrics," (11th Edition)—*Office Gynecology*, (Chicago, The Year Book Publishers, 6th Ed., 1954):

(p. 290): "Some form of conception control is practiced by nearly all married couples except those who know they are sterile * * *. The more satisfactory conception control is, the fewer will be the number of criminal abortions and the better the physical health and mental attitude of a large number of women. The chief reason, among the many, for controlling conception, is any complication that pregnancy would aggravate to the extent of endangering the patient's life. Among these complications are cardiovascular-renal disease, heart disease and pulmonary tuberculosis. Mental conditions, particularly the few which are inheritable, are also indications for the use of contraceptives."

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Hannan, John, M.D.; Hon. Physician, Saffron Hill Maternity Centre, Holborn; late Registrar and Pathologist to the Hospital for Women, Soho Square, London—*Abortion* (Medical Press and Circular, No. 5108, 279, March 31, 1937):

"* * * it seems to me that contraception offers the only effective and rational solution of this problem of abortion. By contraception I mean the instruction of women in the use of such appliances as will prevent the union of the spermatozoa with the ovum.

"Such is human nature that no method which is left to the man to utilize is of any practical value.

"In my experience, the adequate instruction of women at a good contraceptive clinic, with the combined uses of occlusive pessary and spermicidal substance, is sufficient for all except those who are extremely ignorant and careless."

Holden, Frederick C., M.D. Professor Emeritus, Obstetrics and Gynecology, New York University College of Medicine—*Why Women Die in Childbirth* (38 Pennsylvania Medical Journal 157-160, December, 1934):

"* * * the medical profession must take the lead in bringing proper and safe birth control information to the woman who is in need of such advice. Birth control clinics should not be considered as entities apart from other organized medical service. * * * the birth control clinic should be an integral part of every obstetrical service and every patient should be given proper contraceptive instruction as part of her post natal care. The woman should also be educated as to what is safe and what is dangerous as a contraceptive measure * * *. This question has been left too long in the field of personal controversy. It should

be included in all maternal welfare programs under the direction of the medical profession."

Jauncy, J. C., M.D. New England Obstetrics & Gynecological Society; American College of Surgeons; Professor of Gynecology at Boston University School of Medicine—*Medical Gynecology* (Philadelphia: W. B. Saunders, 1950):

(p. 385): "Regardless of the legal prohibition contraception is recognized and demanded by the public, and even in localities where it is absolutely forbidden all persons desiring it may secure it through bootleg sources. In the majority of cases, contraception seems to be a method of family planning which is used with the aim of spacing the children, protecting the mother and insuring a standard of living which will give the children a good start.

"Medical indications for the control of conception include those complications which pregnancy would aggravate to the extent of endangering the patient's life or health. Among these are nephritis, pulmonary tuberculosis, and heart disease. An inheritable mental condition in the patient or her husband is an indication."

Jeffcoate, T. N. A., M.D., F.R.C.S., F.R.C.O.G. Professor of Obstetrics and Gynecology at the University of Liverpool—*Principles of Gynecology* (London: Butterworth & Co., 1957):

(p. 578-580): "Contraception is the prevention of conception by methods other than abstinence from coitus; its use to limit the size of family is birth control or family planning. Contraception is practiced at some time by not less than 70 per cent of married couples in England and Wales and the percentage is ever increasing. It is there-

fore a matter on which medical advice is frequently sought.

"Contraception aims at separating the means from the end, at affording the partners of a union free expression of their mutual affection and satisfaction of their sexual needs without incurring the risk of unwanted children.

"Contraception has been practiced in one form or another throughout history but it has frequently been countermanded by law or custom. Whenever it has been declared illegal the underlying reason has always been economic or political, for example, the need to increase the number of a community in order to establish national or group dominance. Nevertheless it has often been given a cloak of ethics to hide the real objective * * *.

"Contraception has long been neglected by the medical profession, possibly because of the influence of Victorian prudery, possibly because of political, religious and ethical consideration, and certainly because the instruction of patients in the techniques takes time and trouble. This traditional attitude of aloofness cannot, however, be maintained as it becomes increasingly clear that birth control and pregnancy spacing are essential to the physical and mental health of individuals and of families; and that they occupy a place in preventative medicine which increases in importance as the world population expands.

"* * * Phthisis, nephritis, hypertension, cardiac disease, psychoses, neuroses, blood disorder and any disease which makes a woman less able to withstand the strain of pregnancy and labour, or which makes her unfit to cope with the rearing of another child, call for contraception. Some of these illnesses may not be permanent and the possibility that they will ultimately become arrested, circumvented or cured is an added reason for deferring pregnancy.

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"* * * Recurring pregnancy toxemia, recurrent abortion, repeated caesarean section, repaired obstetrical injuries such as vesico-vaginal fistula, and a previous operation for prolapse can justify the avoidance or deferment of further childbearing.

"Disease transmissible to the foetus—the best examples under this heading are syphilis and haemolytic disease but certain diseases in which inheritance plays a part—epilepsy, deaf mutism and haemophilia—deserve mention. Contraception is often indicated when there is a high risk of offspring being mentally or physically defective, as there is amongst couples who have already had two or more abnormal children.

"Birth spacing—If a woman has children too frequently, she has no time to recover from one before she is faced with the next. * * *

"Family Limitation—Some women, constitutionally well fitted, remain physically sound and of equable temperament despite having large families but the majority have a limited capacity for safe reproduction. In general the danger to the mother and the child rise with each pregnancy after the fourth or fifth. The 'dangerous multipara' should be prevented rather than treated."

Knopf, S. Adolphus, M.D. Former Professor of Physiotherapy, New York Post Graduate Medical School and Hospital—*Various Aspects of Birth Control*. (New York, 1928):

(p. 12): "The meaning of the words ['birth control'] is beginning to be rightly understood as designating scientific humane and harmless methods of preventing conception * * * to be made use of in cases where pregnancy may cause physical, mental, or economic suffering, or death. It is life saving and not life destroying * * *."

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(p. 83): "Medical schools * * * should include lectures on birth control in their curricula and physicians seeking instruction in contraceptive methods as well as in producing or curing sterility, should be entitled to receive gratuitous instruction in official birth control clinics.

* * * Birth control clinics, under * * * medical supervision, and under state and municipal auspices, should be established in all larger communities. The birth control clinic should be made self supporting by charging a moderate fee to all able to pay. The research departments of such clinics should be in communication with the federal bureau so that the result might be tabulated, sifted, and verified."

MacLeod, Douglas H., M.S. (London), F.R.C.P. (London), F.R.C.S. (England), F.R.C.O.G: *Gynaecology*, 5th ed., (Boston, Charles D. Reed, Little, Brown & Co., 1955):

(pp. 171-172): "It is the opinion of the writers that medical conditions which are generally considered to call for termination of a pregnancy should be regarded as indications for the giving of contraceptive advice. * * * Serious chronic lesions involving the heart, lungs and kidneys, grave degrees of anemia, co-existing malignant disease and certain mental states all call for effective contraceptive advice."

Menninger, Karl, A., M.D., Member Am. College of Physicians, Am. Psychoanalytic Assn., Am. Psychosomatic Society, Am. Psychiatric Assn., Assn. for Research in Nervous and Mental Disease, Central Neuro-psychiatric Assn. Professor at University of Kansas School of Medicine. Director of Menninger Clinic. Bulletin of Menninger Clinic, *Psychiatric Aspects of Contraception* pp. 38-40, Vol. 7, No. 1, January 1943:

"The reason that contraceptive knowledge and counsel seem to the psychiatrist so essential is based not upon

considerations of the welfare of the adult but upon the considerations of the welfare of the child. Nothing is more tragic, more fateful in its ultimate consequence, than the realization by a child that he was unwanted. * * * This may show itself in a determined campaign or in a provocative program of attracting attention by offensive behavior and even criminal acts. Still more seriously it may show itself as a constant fear of other people or as a bitter prejudice against individuals or groups through deep seated, easily evoked hatred for them. * * * I say that from the purely scientific point of view, planned parenthood is an essential element in any program for increased mental health and for human peace and happiness."

Mudaliar, A. L., B.A., M.D., F.C.O.G., Professor of Obstetrics, Madras Medical College, University of Madras; Second Obstetric Physician and Gynaecologist Government Hospital for Women and Children, Egmore, Madras—*Clinical Obstetrics* (London, Edinburgh, Oliver and Boyd, 1938):

(p. 207): "Tuberculosis. The need for spacing of pregnancy is greater in the tuberculous women than in others; and it cannot be sufficiently emphasized that if marriage be permitted in healed-up cases of tuberculosis there is necessarily a limitation as to progeny. * * *

"If signs of active tuberculosis are found in a woman already married, every care should be taken to see that she does not risk conception."

Wagner, John H., B.S., M.D., F.A.C.P. Professor of Medicine in the Tulane University of Louisiana School of Medicine; Senior Visiting Physician to the Charity Hospital, New Orleans, Louisiana—*Internal Medicine* (Philadelphia, Lea & Febiger, 3rd edition, 1938):

(p. 460): "With a marked aortic insufficiency or a high grade mitral stenosis, there is a likelihood of trouble, and

with an evident reduction in the cardiac function, pregnancy should always be avoided, or, if it occurs, terminated at an early date.".

(p. 600): "In women with glomerulonephritis, whether latent or manifest, pregnancy activates the disease and aggravates it roughly in proportion to the size of the fetus. In such women repeated pregnancies encroach further on the factor of safety of the kidneys and should be avoided."

Novak, Emil, A.B., M.D., D.Sc. (Hon.), F.A.C.S., F.R.C.O.G., (Hon.), Asst. Professor Emeritus of Gynecology, Johns Hopkins Medical School; Gynecologist-in-Chief, Bon Secours Hospital (Baltimore) and Past President of American Gynecology Society, and *Novak, Edmund R.*, A.B., M.D., F.A.C.S.; Instructor and Gynecologist, Johns Hopkins Medical School; Gynecologist, Bon Secours Hospital For Women of Maryland and Union Memorial Hospital, Baltimore—*Voluntary Control of Conception*, (Baltimore, Williams & Wilkins Co., 3rd Edition, 1956):

(p. 696): "As regards the so-called medical indications, there will be little difference of opinion as to the frequent undesirability of pregnancy in the presence of such organic conditions as serious cardiac disease, chronic nephritis, active tuberculosis and diabetes."

Peckham, Charles H., M.D. Associate Professor of Obstetrics, Johns Hopkins School of Medicine—*Chronic Nephritis Complicating Pregnancy* 35 American Journal of Surgery 325-330, February 1937:

"* * * Every woman who has evidence of hypertension or albuminuria at any time during gestation * * * should not contemplate another pregnancy for two years, but should be given contraceptive advice. * * *".

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Peters, John P., M.D. Professor of Medicine, Yale University, School of Medicine—*The Nature of the Toxemias of Pregnancy* 110 Journal of the American Medical Association 329-332, January 29, 1938:

"* * * The only rational treatment is the prevention of pregnancy in women with disease of the arteries and kidneys."

Rock, John, M.D. (Harvard University Medical School) *Maternal Mortality, What Must Be Done About It.* 205 New England Journal of Medicine 962, November 5, 1931:

"One other factor which lessens the risk of maternal death in the Scandinavian countries and in Denmark is that there effective contraceptive practices can be freely taught by able physicians to patients whose physical condition is such that pregnancy and labor will in all probability terminate in death of mother or baby or both, or in serious maternal disablement. * * *"

Rock, John, M.D. (see above) *Medical and Biological Aspects of Contraception* (Clinics, Vol. 1, No. 6, 1598-1600, 1943):

"The intelligent American couple is committed to contraception * * * There are many known inheritable factors which preclude the likelihood of health and happiness of the offspring * * * These factors * * * include diabetes mellitus, feeble-mindedness, dementia praecox, some manic-depressive psychoses, some forms of epilepsy, of blindness and deafness, and of congenital malformations. Easfmian enumerates many other transmissible defects and refers the student to competent authorities for even a more complete list and detailed considerations. While society permits

marriages of individuals bearing these qualities in their genes, if should protect itself by at least making sure that these couples are aware of the best measures known for protection against pregnancy and that any necessary supplies are available to them. * * * No wife should be expected to bear children unless she can do so without serious threat to her own health and reason. The hazard of childbirth is affected, not only by the mother's intrinsic make-up, but by the socio-economic conditions of her family life."

Simpson, J. J. M.D. Professor of Medicine at University of California School of Medicine in Berkeley, San Francisco, Cal. *Heart Disease As a Complication of Pregnancy.* (7. California Medicine, 383-390, May 1949.)

"There are grave dangers of heart failure during pregnancy, labor or the postpartum period in women who have had congestive failure prior to pregnancy or during a previous pregnancy and delivery.

"Decisions as to whether or not to recommend avoidance of pregnancy or therapeutic abortion should depend not alone upon the prospect of death during gestation or at the time of delivery, but also upon the possibility of increased impairment of heart function and physical incapacity of the mother in the postpartum period.

"The exertion of labor, "though generally inconsequential, in some cases may produce sustained oxygen debt."

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Savill, Agnes. M.D., M.A., M.R.C.P.I. Formerly Physician to St. John's Skin Hospital and *Warner, E. C.*, M.D., B.S., F.R.C.P. Physician to Out Patients, Charing Cross Hospital; Senior Physician, Putney Hospital. (Editors)—*Savill's System of Clinical Medicine* (London, Edward Arnold, 11th edition, 1939):

(p. 98): "Heart disease as affected by pregnancy. . . . If signs of failure are present pregnancy must not occur or must be terminated."

"*Shaw's Textbook of Gynecology*," 7th Edition, revised by *John Hopkins*, M.D., M.S., F.R.C.S., F.R.C.O.G.: Obstetrician and Gynecological Surgeon, St. Bartholomew's Hospital; Gynecological Surgeon, Royal Masonic Hospital and Hempstead General Hospital (Royal Free Hospital, Group, London); Examiner in Midwifery to the Universities of London and Cambridge. (London, J. & A. Churchill, Ltd. 1936):

(pp. 295-6): "In certain medical conditions pregnancy may be a threat to health, or even life and is contraindicated temporarily or permanently. Such conditions include active pulmonary tuberculosis, renal disease, severe cardiac disease, severe toxemia in previous pregnancies and puerperal insanity. Limiting the number of pregnancies may be necessary in Rhesus incompatibility. Temporary postponement may be advisable after an operation or debilitating illness. . . ."

Stone, Eric M.D. Attending Surgeon, Gynecology, R. I. Hospital, Providence—*Contraception as Possible Means of Reducing Gynecologic Morbidity* (212 New England Journal Medicine 511-17, March 21, 1935):

"Many repeating hospital patients could have been saved re-entry had they received contraceptive advice after one of their preceding deliveries."

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Taussig, F. J. M.D. *Abortion: Spontaneous and Induced* (St. Louis, Mosby, 1936):

(p. 451): "Of all measures suggested for the control of abortion none equals in importance the widespread establishment of clinics for contraceptive advice and provision for the free distribution of contraceptive materials among the poor."

Taussig, F. J. M.D. *Controlling Size of Family* (35 Journal of the Arkansas Medical Society 123, 1938):

"The more we go into the study of preventive medicine, the more we realize that disease is less the product of bacterial invasion than the result of our way of living, and that drugs and surgery avail less in its control than changes in environment, nutrition and the interrelationship of the family. The key-stone in the arch is as a rule the health of the mother. If she becomes an invalid or dies, the physical well being of the children is almost certain to suffer."

Taylor, Frederick, M.D. *Practice of Medicine*, (London, J. & A. Churchill, E. P. Poulton, 15th edition, 1936):

(p. 275): "Heart disease and pregnancy. * * * the presence of auricular fibrillation should be looked upon as an absolute bar" (to pregnancy).

Titus, Paul, M.D. *The Management of Obstetric Difficulties* (St. Louis, C. V. Mosby, 2nd edition, 1940):

(p. 208): "The occurrence of pregnancy in women with active tuberculosis is a great misfortune; its prevention by means of suitable contraceptive measures is to be

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recommended and when patients are too indolent or too ignorant to employ these, operative measures for sterilization should be employed. * * *"

Williams, J. Whitridge, M.D. Former Professor of Obstetrics, Johns Hopkins University, Medical School—*When is Advice Concerning the Prevention of Conception Justifiable* (91 Journal American Medical Association 1241; 1928):

"Where should we stand as medical men? To my mind there can be only one answer, and that is that we must give contraceptive advice whenever it is medically indicated * * * it is just as much our duty to give such advice when medically indicated as it is to advocate the employment of any other prophylactic measure.

"We must advise the multiparous woman suffering from chronic nephritis not to become pregnant, and the same applies to tuberculosis and serious heart disease. Consequently, if we feel that such advice is necessary we must give directions as to how it can be made effective, for if we do one without the other we are failing in our duty as physicians and in great part are wasting our time. I likewise feel that similar advice is indicated when we see a patient steadily going down hill as the result of pregnancies recurring at too close intervals, as well as in certain neurotic and maladjusted women whose entire life is disturbed by a constant dread of pregnancy. Indeed the list of indications might be considerably increased if time and space permitted."

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Williams, John Whitridge, M.D. (see above) *Obstetrics* (N. Y. Appleton-Century, 8th edition, edited by Henricus J. Stander, 1941):

(p. 552): "We regard the occurrence of pregnancy in women with active tuberculosis as a great misfortune, and consequently recommend the prevention of pregnancy by the most available contraceptive methods * * *"

(p. 564): "In multiparous women in whom the [heart] lesion becomes accentuated in each succeeding pregnancy, contraceptive advice is indicated."

(p. 612): "Pregnancy after removal of kidney. * * * When consulted by a woman with one kidney as to the advisability of becoming pregnant, we suggest a thorough evaluation of the capabilities of the remaining organ. Should it be found unsatisfactory we advise contraceptive practices."

Williams, T. J., M.D. Professor of Obstetrics and Gynecology, University of Virginia Department of Medicine—*Factors in Maternal Mortality* (62 Virginia Medical Monthly, 68-74, May, 1936):

"Among the poorly educated portions of our population particularly in the rural, and, in our own state, in the mountainous areas, no attempts at family limitation have been made, so that in this group large numbers of closely spaced pregnancies are the rule. This group, with its higher parities, is important in the maintenance of the high death rate. * * * An important consideration in the maternal mortality rate is the deaths associated with abortion. * * * Eliminating those deaths classed as homicide * * * one is left with the amazing fact that approximately one-fourth of all maternal deaths follow abortions. * * *".

APPENDIX B

I. Resolutions and Recommendations of the Organized Medical Profession Regarding the Medical Necessity for Conception Control and the Use of Drugs, Medicinal Articles and/or Instruments for That Purpose

A. National Medical Associations

(1) The resolution adopted by the House of Delegates of the American Medical Association in 1937 is printed in the text of the brief. (Point II, A).

(2) In 1938 the Section on Obstetrics and Gynecology of the American Medical Association noted the 1937 resolutions of the House of Delegates and adopted the following recommendation of the Committee to Study Contraceptive Practices and Related Problems:

> "Resolved that the Section on Obstetrics and Gynecology of the American Medical Association heartily endorses the adoption of these recommendations, congratulates the Association on its stand, and in view of the urgency of the situation requests early action in accordance with said recommendations."[1]

(3) In 1938 the Section on Nervous and Mental Diseases of the American Medical Association passed the following resolution:

> "WHEREAS, State and Federal legislation governing the control of conception is conflicting, and renders certain phases of medical practice illegal, it is important that the profession of medicine as a whole should clarify and lead in these questions involving medical

1. Journal of the American Medical Association, July 9, 1938.

practice and procedure. The importance of such control in medical practice where such control constitutes a therapeutic measure is obvious to enlightened lay opinion throughout the civilized world and should be obvious to all medical men not medievally minded; Therefore be it:

"RESOLVED, that we hereby recommend the alteration of the existing laws wherever necessary, so that physicians may legally give contraceptive information to their patients; * * *"[2]

(4) In 1935 the American Gynecological Society, which is a national group of specialists practising in that field, adopted the following resolution:

"Whereas: State and Federal legislation governing the control of reproduction is conflicting and renders certain phases of medical practice illegal, it is important that the medical profession as a whole should undertake to clarify and lead in these questions which involve medical practice, and procedures. The importance of such control in medical practice, where such control constitutes a therapeutic measure is obvious to all medical men."[3]

(5) In 1936 the American Neurological Association, a national group of specialists in that field, adopted a resolution recognizing that " contraception is a necessary and vital part of preventive medicine; * * * Contraception is also of great importance in the treatment of some

2. Journal of the American Medical Association, July 2, 1938.

3. (4) "Gynecological Transactions," LII (1936).

neuropsychiatric conditions, especially of anxiety states due to the fear of pregnancy."[4]

In 1937 the American Neurological Association adopted a second resolution urging the American Medical Association to consider the matter of teaching of contraception and medical supervision of contraceptive clinics in hospitals, stating in part:

> "The time has passed for discussion and debate * * * the physician is now free to use contraceptives in his practice and should be educated in their use."[5]

(5) In 1939 the American Association of Medical Students adopted the following resolution:

> "Be it resolved: that the Association of Medical Students go on record as advocating the adequate instruction—both didactic and clinical—in the indications for and techniques of contraception, as an integral part of the medical curriculum."[6]

(6) The resolution adopted by the Governing Council of the American Public Health Association appears in the text of the brief. (Point III, B, 2).

4. "Transaction of the American Neurological Association" 1936 The William Byrd Press, Inc., Richmond, Va., p. 205.

5. "Transactions of the American Neurological Association" 1937 The William Byrd Press, Inc., Richmond, Va., p. 197.

6. 3 Journal of the Association of Medical Students 1938-40, in Feb. 1939 edition, No. 5, Convention Resolutions, pr 85.

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B. State and Regional Medical Associations

In 1931 the Connecticut State Medical Society became one of the first state medical societies to make a policy statement as follows:

> "The Connecticut State Medical Society is concerned solely with the medical and public health aspects of Birth Control. The present Connecticut statutes provide for the legal performance of abortion in the presence of tuberculosis, heart disease, nephritis and other serious diseases. With this in mind it appears reasonable that our patients be further safeguarded by legalizing the dissemination of contraceptive advice for medical purposes, by licensed practitioners * * *"[7]

A further statement made in 1932 appears in the text of the brief. (Point I A).

In 1931, the New York Academy of Medicine adopted a report of its Committee on Public Health Relations recommending that hospitals offer more contraceptive services in charge of experienced gynecologists and that the medical schools and hospital clinics should offer instruction in contraceptive services and the indications for their use.[8]

The Academy stated: "The public is entitled to expert counsel and information by the medical profession on the important and intimate matter of contraceptive control."[9]

7. Proceedings of the Connecticut State Medical Society, 1931, p. 76.

8. Bulletin New York Academy of Medicine, April 1931.

9. "Anatomy of a Victory," Planned Parenthood Federation of America, Inc., 1959, Appendix I.

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In 1945, the same Committee conducted a further study. The Academy considered this question again and adopted a report in 1946 recommending that:

"1. The New York Academy of Medicine . . . should assume leadership in the recognition of medically indicated contraception as an integral and essential part of preventive medicine.

2. Contraceptive advice should be given by well trained physicians, both in their offices and in hospital clinics, only when on the basis of a thorough medical study, they are professionally and morally satisfied that such action is justified. Child-spacing should be recognized as a medical indication.

. . . .

4. Inasmuch as family-planning advice is a health service, private physicians and hospitals, as well as the proper health authorities, should assume the responsibility of providing it." [10]

The Academy, in 1958, reaffirmed the 1946 action.[11]

In 1938, the Alabama State Medical Association,[12] and the Arizona [13] and South Carolina State Medical Associa-

10. Bulletin New York Academy of Medicine, October 1946, p. 555.

11. Letter from Dr. H. D. Kruse, Executive Secretary of the Academy, to New York City Hospitals Commissioner Dr. Morris Iscobs, dated January 7, 1958, reprinted in "Anatomy of a Victory," published by the Planned Parenthood of America, 1959, Appendix II.

12. "Resolutions Dealing with Child-Spacing Programs Passed by State Medical Societies." Planned Parenthood Federation of America, Inc., p. 1.

13. *Ibid.*, p. 2.

tigis[15] each adopted resolutions concurring in the action of the American Medical Association endorsing contraception. In the same year, the Arizona State Public Health Association took action similar to that which had been taken by the medical society of that state.[16]

In 1939, the Georgia State Medical Association, taking note of the action of the American Medical Association, further stated that:

> "whereas, the public has no place and no one to whom they can go for authentic information except the regular qualified physician."

"Be It Resolved:

> "That the State Board of Health be requested to furnish contraceptive information upon the application for same by any licensed physician, or upon application for same by any Public Health official, or County Health Officer of this State.

"Be It Understood:

> "That this information be furnished only to those patients for whom the physician deems it necessary for the proper spacing of pregnancies, and for the protection of the life of the expectant mother."[17]

15. [illegible] p. 2

16. [illegible] p. 2

17. [illegible] p. 2

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In 1940, the State Medical Association of Texas passed the following resolution:

"Whereas, there has been, and is now, much interest in maternal health and child welfare and much confusion in the minds of the public as regards the medical field of contraception, and

"Whereas, the prevention of conception in appropriate cases has always been a proper problem for the practice of medicine; therefore,

"Be It Resolved: That the teaching and study of scientifically correct methods of prevention of conception and the actual practice of prevention is a suitable subject for teaching and study in medical colleges and in recognized, professionally controlled, women's clinics."[1]

In 1942, the Florida State Medical Association adopted the following resolution:

"Whereas, The Maternal Welfare Committee of the Florida State Medical Association has been given the responsibility of investigating and recommending action to the Association on matters pertaining to maternal welfare, and

Whereas, The death rate due to conditions associated with pregnancy in Florida is higher than any other State in the United States, and

Whereas, The Florida State Medical Society at its meeting held in Ocala in May, 1935, sought leadership from the American Medical Association with regard to the dissemination of fertility information in cases

[1] Texas State Journal of Medicine, June 1940, p. 140.

where it is necessary to conserve the life or health of mothers, and

Whereas, The public looks to the medical profession for leadership in medical and scientific matters involving the health of women of the State; Therefore,

Be It Resolved: That the Florida Medical Association encourages physicians to accept the responsibility for giving such information relating to pregnancy, spacing and fertility as each physician may deem it necessary to his patients, and reaffirms its belief in the physician-patient relationship; and

Be It Further Resolved: That the Association approves this principle in connection with the maternity clinics being conducted by the State Board of Health for indigent patients."[18]

In 1942, the Medical Association of Virginia passed the following resolution:

"Whereas, The Maternal Health Committee of the Medical Society of Virginia has been given the responsibility of investigating and recommending action to the Society on matters pertaining to maternal health,

"Therefore, Be It Resolved:

"1. That the Medical Society of Virginia encourage private practitioners to accept the responsibility for giving information relating to the prevention of pregnancy to those patients for whom the physician believes contraceptive procedures to be indicated for medical reasons.

18. 28 Journal of the Florida Medical Association 537, April 14, 1942

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"2. That indigent prenatal patients should attend maternal and child health clinics, operated under the direction of the State Health Department, be encouraged to return to these clinics for postnatal care, and that they be given birth control information and advice as part of the clinic routine, if such information and advice is thought by the clinician in charge to be indicated for medical reasons.

"3. That procedures for contraceptive advice be made available to patients in the State operated sanatoria for treatment of tuberculosis patients if, and when, satisfactory arrangements can be made by the State Health Commissioner.

"4. That interested lay persons be encouraged to supply, upon request by local physicians, material for carrying out contraceptive procedures for those patients not able to secure such material otherwise."[19]

Numerous other State Medical Societies have, from time to time, passed resolutions similar to those quoted.[20]

In September 1958, the New York City Board of Hospitals issued a resolution which stated:

"1. When there are clearly defined medical conditions in which the life or health of a woman may be jeopardized by pregnancy, it is generally recognized by the medical profession that contraceptive measures are proper medical practice.

"2. Municipal hospitals should provide such medical advice, preventive measures and devices for female

19. 69 Virginia Medical Monthly 514, September 1942.

20. See footnote 12, *supra*.

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patients under their care whose life and health in the opinion of the medical staff may be jeopardized by pregnancy and who wish to avail themselves of such health services.

"3. Physicians, nurses and other hospital personnel who have religious or moral objections should be excused from participation in contraceptive procedures."[21]

On March 18, 1959 the Chicago Gynecological Society passed the following Resolution:

"Inasmuch as family planning advice is a health service, physicians, hospitals and appropriate public health authorities who believe in this should assume the responsibility of providing it."

"As specialists in the field of Obstetrics and Gynecology, we wish to emphasize our conviction that the proper prescription of child-spacing measures is an important and, indeed, essential aspect of preventive medicine and should be available to all patients who desire it, whether they obtain their medical care through private physicians or tax and community supported health services.

"We believe family planning to be an essential part of modern medical practice. We believe all doctors in private or public hospitals should be given complete freedom to provide all these essential services, in the best interests of the American family."[22]

21 N. Y. Times, September 18, 1958.

22 Planned Parenthood News, Spring 1960.

APPENDIX C

Religious Views

A. Protestant

"1. The 1960 General Conference of the Methodist Church[1] approved a report of its Committee on The State of The Church, which stated:

> "We affirm the principle that planned parenthood, practiced in Christian conscience fulfills rather than violates the will of God.
>
> "We take this stand in the conviction that God requires human, responsible choice in every matter of moral decision, including such grave matters as the issues of birth and death. We believe it is the will of God that every child born into the world should be wanted, loved, cared for, and reared with opportunities for physical and spiritual health and growth toward mature personality. Apart from responsible parenthood this is impossible.
>
> "We deplore the fact that opposition to such procedures has injected this issue into the political scene, but we believe that the position herein stated is valid, locally, nationally and internationally. In view of the magnitude of the issue, it must not be evaded."[2]

1. The Methodist Church has over 9,672,000 members. Membership statistics in this and ensuing pages are taken from Yearbook American Churches (1960).

2. Report No. 7, Committee on State of the Church, adopted May 3, 1960.

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2. The Council for the Christian Social Action,[3] United Church of Christ,[4] comprising the Congregational Christian Church and the Evangelical & Reformed Church, stated in 1960:

> "Responsible family planning is today a clear moral duty. We believe that public law and public institutions should sanction the distribution through authorized channels of reliable information and contraceptive devices. Laws which forbid doctors, social workers and ministers to provide such information and service are infringements of the rights of free citizens and should be removed from the statute books. Any hospital which receives public funds should permit doctors to provide all services they consider necessary."[5]

3. This reaffirmed earlier action of each of the merged churches. The Evangelical and Reformed Church, at its General Synod in 1947 expressed itself:

> "* * * as supporting the right of married persons to all appropriate medical aid in the wisest planning of their families, and protests the practice of organized minorities which deny them this right through law or pressure on responsible social agencies."[6]

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3. Cf. Resolution of Federal Council of Churches, Commission on Marriage and the Home (1931); see also "Moral Aspects of Birth Control," published by Federal Council of Churches (1938).

4. This denomination has over 2 million members.

5. *Social Action*, Vol. 26, No. 8, April 1960, pp. 24-27. Planned Parenthood News, Winter, 1960.

6. "Information Service," published by the Bureau of Research & Survey, National Council of Churches, Vol. XXXVII, No. 12, June 14, 1958.

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4. The Congregational Christian Churches, at the General Council in 1931 had stated:

> "We believe in the ideal of marriage as the complete union of one man and one woman, who, forsaking all others, give themselves unto each other. This ideal, we are convinced, cannot be realized without mutuality and freedom resulting from physical and spiritual oneness. We believe in the right of children to be wanted and the right of husbands and wives to assume parenthood. Therefore, we favor the principle of voluntary child-bearing, believing that it sacramentalizes physical union and safeguards the well-being of the family and society."[7]

5. The General Assembly of the United Presbyterian Church[8] meeting in May of 1959 declared:

> "Recognizing that in the wisdom of God Christian marriage is a relationship of love and fidelity which involves both companionship and parenthood, and
>
> "Believing the sexual life within this relationship is given by God for the benefit of his children, and is neither an ethically neutral aspect of human existence, nor an evil which needs to be justified by something else, as for example, by the procreation of children;
>
> "The 171st General Assembly
>
> "Approves the principle of voluntary family planning and responsible parenthood,
>
> "Affirms that the proper use of medically approved contraceptives may contribute to the spiritual, emotional and economic welfare of the family,

7. "Moral Aspects of Birth Control," *supra*, note 3.

8. Approximately 3,100,000 members.

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"Urges the repeal of laws prohibiting the availability of contraceptives and information about them for use within the marriage relationship * * *"[9]

6. The General Assembly of the Presbyterian Church in the United States,[10] meeting in Florida in 1960 adopted a report stating:

"If man and wife are not to be denied mutual fulfilment in the sexual relation and if society is not to be penalized by the unplanned and irresponsible production of children, it will follow that access to information regarding the best methods of birth control is the right of all married couples, and the provision of this information the duty of a responsible society."[11]

7. At the American Baptist Convention of 1959,[12] the following statement was released:

"We commend those who assume responsibility for gaining world acceptance of the simple techniques of planned parenthood and large scale population control. We particularly commend * * * organizations which have taken strong and successful stands for the responsible public administration of legalized methods of birth control and family planning."[13]

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9. Planned Parenthood News, Spring, 1959.

10. Approximately one million members.

11. Assembly Release No. 4, issued April 28, 1960 by Publicity Dept., Presbyterian Church in the United States.

12. Over 155,000 members.

13. Resolutions Adopted by American Baptist Convention, published by Council on Christian Social Progress, 1959.

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8. The 1958 report on "The Family in Contemporary Society" and the report of the Lambeth Conference of Bishops of the Anglican Communion, which includes the Protestant Episcopal Church in the United States,[14] are referred to in the text of the brief. (Point III, A).

9. At its Twentieth Biennial Convention held in 1956 at Harrisburg, Pennsylvania, the United Lutheran Church[15] released the following statement:

> "Husbands and wives are called to exercise the power of procreation responsibly before God. This implies planning their parenthood in accordance with their ability to provide for their children and carefully nurture them in fullness of Christian faith and life. The health and welfare of the mother-wife should be a major concern in such decision. Irresponsible conception of children up to the limit of biological capacity and selfish limitation of the number of children are equally detrimental. Choice as to means of conception control should be made upon professional advice."[16]

10. In 1954, the 95th Synod of the Augustana Lutheran Church[17] stated:

> "A married couple should so plan and govern their sexual relations that any child born to their union will be desired for itself and in relation to the time of its birth. So long as it causes no harm to those

14. Over 3,000,000 members.

15. Approximately 2,294,000 members.

16. Information Service, *supra*, note 6.

17. The Augustana Lutheran Church has approximately 582,000 members.

involved, none of the methods for controlling the number and spacing of children has any special moral merit or demerit. The power to reproduce is His blessing, not a penalty upon the sexual relationship in marriage."[18]

11. In 1930, The American Unitarian Association[19] stated that it:

> "* * * Recommends to its constituent churches and members an earnest consideration of the fundamental social, economic and eugenic importance of birth control to the end that they may support all reasonable efforts in their communities for the promotion of the birth control movement."[20]

12. The Universalist Church,[21] at its General Convention in 1929, issued the following statement:

> "* * * the control of conception is not a theory which we may accept or reject, but is one of the most important facts of modern life, giving man the power to control the future of the race. * * * Birth control is the prevention of conception only and is not the destruction of embryonic life, which is abortion. It involves the conscious control of procreation, with resultant important bearings on social and individual life * * *. Birth control is one of the most practicable means of race betterment. This Convention urges the immediate repeal of such federal and state laws as

18. Information Service, *supra*, note 6.

19. Approximately 110,000 members.

20. Information Service, *supra*, note 6.

21. Approximately 70,000 members.

interfere with the prescription of contraception by physicians, and that * * * socially minded persons establish in every center of population clinics where those needing it may receive conceptive advice under medical supervision."[22]

13. Some Protestant denominations officially maintain that the matter of contraception is a matter for individual conscience. Leaders have stated their own positions, among which the following are illustrative: The Philadelphia Yearly Meeting of Friends (Arch Street) stated:

> "The proper use of approved contraceptives may contribute to the social and economic welfare of the home and to the physical and mental health of parents and children."[23]

James E. Craig, Life Elder and Trustee of the Park Avenue Christian Church, New York, stated:

> "* * * a majority of Disciple[24] ministers believe that birth control is justifiable under certain circumstances. * * * In general, Disciples are content to leave such matters to the individual consciences of husband and wife."[25]

Milton G. Herschel, a Jehovah's Witness[26] Minister and the Director of the Watchtower Bible and Tract Society, stated the position of that group as follows:

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22. Moral Aspects of Birth Control, *supra*, note 3.

23. *Ibid.*

24. There are approximately 2 million Disciples in America.

25. Rosten, Leo, "A Guide to the Religions of America, (Simon & Schuster, 1955), pp. 44, 45.

26. Approximately 227,000 members.

"Jehovah Witnesses regard birth control as an entirely personal matter."[27]

14. Some individual expressions of opinion from important Protestant clergymen follow:

Dr. Harry E. Fosdick (Baptist), Pastor Emeritus, Riverside Church, New York:

> "Birth control is a Godsend. Planned parenthood can assure every infant his birthright of health, care and a warm welcome."[28]

The Reverend G. Bromley Oxnam (Methodist), Bishop of the Washington Area;

> "Christian parents are morally obligated to plan for the coming of their children. The proper spacing of children is an expression of love, and therefore is a religious obligation."[29]

Dr. Norman Vincent Peale, Marble Collegiate Church, New York:

> "It is no more wrong to control scientifically this natural force (human reproduction) than it is to harness and direct any of God's forces in this universe."[30]

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27. "A Guide to the Religions of America," *supra*, note 25, p. 63.

28. "The Churches Speak Up On Birth Control." Planned Parenthood Federation of America, Inc., 1960.

29. *Ibid.* (From a speech to National Family Life Conferences in Cleveland, Ohio.)

30. From a radio statement made over National Broadcasting Co. network, Feb. 25, 1955.

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The Rt. Reverend James A. Pike, Bishop, Episcopal Diocese of California:

> "Men are responsible under God for the conscious direction of every aspect of their lives. The bearing of children should be the result of thoughtful decision and be entered into in a sense of vocation."[31]

Dr. James H. Robinson (Presbyterian), Senior Pastor, Church of the Master, New York;

> "Careful and thoughtful planning to bring children into the circle of the family and the life of this world is essentially a religious conception of reverence for life, and a Christian ideal of stewardship of creative powers, as parents share with God in the continuous unfolding of His divine purpose."[32]

The Reverend Henry P. Van Dusen (Presbyterian), President Union Theological Seminary:

> "Virtually all Protestants believe that sexual union is a divine provision, not only for the propagation of children but also for the deepening and sanctifying of the spiritual union of husband and wife. An increasing number of Protestants favor an intelligent and consecrated use of means to assure the number and spacing of children which will best further the divine intention for the family ('planned-parenthood')."[33]

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31. The Churches Speak Up On Birth Control, *supra*, note 28.

32. *Ibid.*

33. "A Guide to the Religions of America," *supra*, note 25, p. 114.

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B. Jewish

1. The position of Reformed Jews was stated by the Central Conference of American Rabbis as early as 1929, as follows:

> "We • • • urge the recognition of the importance of the control of parenthood as one of the methods of coping with social problems."[34]

This position was reaffirmed in 1959 by the 45th General Assembly of the Union of American Hebrew Congregations, parent body of Reform Jewish Synagogues in the United States and Canada, with over a million members. (See text of the brief Point III, A, 2.)

2. The Rabbinical Assembly representing Conservative Judaism states:

> "Proper education in contraception and birth control will not destroy, but rather enhance, the spiritual values inherent in the family and will make for the advancement of human happiness and welfare."[35]

3. The Rabbinical Alliance of America, the organization of Orthodox Jewish rabbis, explained the position of Orthodox Jews in commenting on a ban on contraceptive advice in New York City hospitals:

> "[The ban] jeopardizes the hallowed American tradition that governmental agencies must • • • never seek to impose on the people they service any kind of sectarian viewpoint.

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34. "Moral Aspects of Birth Control," *supra*, note 3.

35. The Churches Speak Up On Birth Control, *supra*, note 28.

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"The Rabbinical Alliance feels itself impelled to clarify the viewpoint of Orthodox Judaism on birth control practices, which we feel has been erroneously represented. Orthodox Judaism does not condone any artificial birth control measures by the male spouse, under any circumstances. *Only in cases where the health of the female is jeopardized* are certain birth control measures allowed and then only through direct consultation between the medical and rabbinic authorities." (Emphasis supplied)[36]

4. Dr. David H. Wice, Rabbi, Congregation Rodeph Shalom, Philadelphia, has stated:

"The concept of the 'Sanctity of Life' is enhanced, and the 'Holiness of Marriage' is given a new dimension when parenthood is freely elected, when children are born 'wanted' and when family size is determined by considerations of health and well-being for the individual family and for society. Birth control, for centuries obligatory in Jewish tradition for humane reasons, is today also a social imperative."[37]

C. Catholic

The Catholic position is set out in the text of the brief (Point III, A, 3).

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36. New York Times, August 12, 1958.

37. The Churches Speak Up On Birth Control, *supra*, note 28.

APPENDIX D

Representative Statements of Medical Authorities With Respect to Abstinence as an Alternative to Contraception

Child, Charles Gardner, Jr.—"*Sterility and Fertility*" (New York, Appleton, 1922, p. 201):

"We know that for many women further pregnancies are simply out of the question. With such it is but foolish to advise continence, for married life without intercourse is hardly to be realized. * * *"

Crichton-Miller, H. (Director, Tavistock Clinic for Functional Nerve Disease)—"*Medical Aspects of Contraception*" (London, Hopkinson, 1927, p. 182):

"Abstinence involves a strain upon one or both of the mates, which, in some cases, is absolutely incompatible with health and happiness. I am sure there is no experienced doctor in my department of medicine but could cite numerous cases of unhappiness, irritability, neurasthenia, and the like, due to faulty adjustment."

Dawson, Lord, of Penn. (Physician to King George V)—"*Medical Aspects of Contraception*". (London, Hopkinson, 1927):

"Abstention, to be effective, constitutes a demand impossible for the mass of married people to meet. Efforts at such abstention produce a strain harmful to health and temper. If they do not succeed, the minds of husband and wife are troubled by anxieties and conflicts which do them damage, and if they do succeed in preventing conception there eventuates the prevalence of sex excitement, followed by abortive and half-realized satisfaction. Moreover, there is an increased susceptibility of the man and woman to outside sex temptations. Birth control by abstinence is either ineffective or if effective pernicious."

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Ellis, Havelock—"Studies in the Psychology of Sex," Vol. VI. "*Sex in Relation to Society*" (Philadelphia, F. A. Davis Company, 1910, p. 182):

"Krafft-Ebing showed that sexual abstinence could produce a state of general nervous excitement (*Jahrbuch fur Psychiatrie*, Bd. vii, Heft 1 and 2). Schrenck-Notzing regards sexual abstinence as a cause of extreme sexual hyperaesthesia and of various perversions (in a chapter on sexual abstinence in his *Kriminalpsychologische und Psycholathologische* * * * pp. 174-178)."

Goddard, Charles E. (Institute of Public Health: Medical Officer of Health, President London Medical Board)—"*Some More Medical Views on Birth Control*" (New York, Dutton, 1928, p. 131):

"The suggestion that continence is the only remedy, and is all that is required, to me is just foolishness, if not canting nonsense; and I have no patience or sympathy when such a statement is advanced to satisfy a theory which they know is not feasible, is not practicable, especially if applied to young married people, and (as is well known) is not seriously attempted by any class."

Haire, Norman—"*Medical Aspects of Contraception*" (London, Hopkinson, 1927, p. 144):

"In the case of married persons, already habituated to coitus, and living in intimate relationship, with their partners, and so subjected to more or less continued sexual stimulation, prolonged sexual abstinence is usually, I think, definitely harmful."

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Kolman, Sarah R. M.D.,—"*Some Psychiatric Aspects of Birth Control*" (94 American Journal of Psychiatry 317, 326, 1937):

"Any unbiased student must admit that sexual frustration, from whatever source, results in quarrels, unhappiness, infidelity, neurosis, desertion and divorce."

Kleegman, Sophia J., M.D., F.A.C.S., Clinical Professor of Obstetrics and Gynecology, New York University College of Medicine; and Medical Director, the New York State League for Planned Parenthood:, *Therapeutic Abortion, Medical, Psychiatric, Legal, Anthropological and Religious Considerations* (edited by Harold Rosen, Ph.D., M.D., The Julian Press, Inc., 1954 (pp. 255-256)):

"Normal sex life is an important contribution to wholesome marital adjustment. Fear of pregnancy leads to fear of sex life, to anxiety, and to emotional conflict. Every normally fertile couple will need to employ safe methods of contraception for considerable periods of time during their married life. Knowledge of how to do this is psychologically necessary not only for the new mother or the mother of an already established family but for many young married couples as well, especially at the start of their marriage, to enable them to build sound marital relationships based, in large part, on ability to conceive their children in accordance with their development, their strength and their resources."

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MacLeod, Douglas H., M.S., F.R.C.P., F.R.C.S., F.R.C.O.G.; Gynaecological Surgeon, St. Mary's Hospital. Consulting Surgeon, Queen Charlotte's Maternity Hospital. Gynaecological Surgeon, The Royal Marsden Hospital and the Putney Hospital. Hunterian Professor, Royal College of Surgeons of England, 1946. Examiner in Obstetrics and Gynaecology to the University of Cambridge and the Royal College of Obstetricians and Gynaecologists—*Gynecology* (Boston, Little, Brown & Company, 1955, pp. 170-71):

"The obvious way to avoid a pregnancy is by total abstinence, but the impracticability of advising this in all but very few instances makes it relatively useless as a means of birth control. While a few patients will accept such advice without resulting suffering, the majority, while refusing, would in effect suffer in respect of marital harmony if they did abstain. It would be exceptional for one party at least to accept abstinence for any prolonged period, and indeed such acceptance would by many be regarded as abnormal."

Menninger, Karl, M.D., (For qualifications, see Appendix A, p. 17a). *Psychiatric Aspects of Contraception*, Bulletin of Menninger Clinic, Vol. 7, No. 1, January 1943:

"Clinical experience brings us as psychiatrists to the very definite conclusion that while in the lower animals sexual pleasure is primarily a means to an end, in human beings it is not only a means to an end but also a very important end in itself. With a much more elaborate central nervous system and a far more complicated social environment, the human being no longer reacts as animals do in a simple reflex way to the sensory indications of a reproductive opportunity. The impulse for sexual union

travels a long, complicated path and becomes entwined, as Havelock Ellis says, with all the highest and subtlest human emotions and activities, with the refinements of social intercourse in every sphere, with art, with religion, with all the facets of that which we call love between human beings. The thwarting of this means the interference with productivity and creativeness in all spheres and the interference with the harmony of human affection which law, religion and social custom are at such pains to nurture."

Millard, Charles Killick, M.D., D.Sc. President of Society of Medical Officers for Health—*Medical Aspects of Contraception* (London, Hopkinson, 1927, p. 111):

"I feel strongly that where the husband and wife cohabit and are on affectionate terms, complete abstinence from sexual relations is definitely injurious both physically and psychologically. Further, I believe that in the great majority of normal young couples it is so impracticable that sooner or later it would certainly break down. It runs counter to one of the primary and fundamental objects of marriage."

Parshley, H. M. (Professor Zoology, Smith College—*Biological and Medical Aspects of Contraception* (American Conference on Birth Control and National Recovery; National Committee on Federal Legislation for Birth Control, Inc., (Washington, D. C., 1934, p. 16):

"Strong evidence tends to show that *complete* repression of the sexual impulse, is practically impossible; and that such apparent success as is obtained results in the emergence of sex activity in questionable shapes, together with psychological disturbances that often assume serious proportions."

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Reynolds, Edward T., M.D., F.A.C.S., and *Macomber, Donald*, M.D., F.A.C.S.—*Fertility and Sterility in Human Marriage* (Philadelphia, W. B. Saunders Company, 1924, p. 211):

"Complete restraint in a couple who are living together in the daily contacts of marital life is, however, so unnatural that it is almost inevitably followed by disturbances in their sexual organs. In point of fact, it can hardly exist between normal individuals without verging upon the third and most extreme mistake of habit.

"No condition is so harmful to the organs as continued presence of desire without gratification. Any frequent excitation of this condition inevitably leads to chronic and usually severe congestion."

Robinson, William J., M.D. (Late Chief Dept. Genito-Urinary Diseases and Dermatology, Bronx Hospital, New York; Author and Editor)—*Birth Control: or the Limitation of Offspring by Prevenception* (N. Y. Eugenics Publ. Co., 1933, p. 36 f):

"Two remedies" (to effect the limitation of offspring) "are proposed by our reactionary philosophers and sociologists. * * * The second is to abstain—that married people should abstain from sexual relations.

"To give advice which we know is impossible of being followed is the acme of vacuity. But where married people were foolish enough to follow this advice the effects were pernicious.

"For married people to attempt to abstain for any length of time means to lay the foundation for irritability, nervousness, or even genuine neuroses, and cooling or even destruction of the affections. It means more; it very often means driving the husband into the arms of prostitutes with the possible risks of venereal disease."

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Rock, John, M.D. Harvard University Medical School—*The Scientific Case Against Rigid Legal Restrictions on Medical Birth-Control Advice*, reprinted from Clinics, Vol. 1, No. 6, 1943, (J. B. Lippincott Company, pp. 1609-10):

"'*Dangers of Inhibition of the Coital Urge.* Suppression of the coital urge directed towards his wife is possible for the intelligent considerate husband aware of a good reason why she should not become pregnant. But the urge is still there and unless, by appropriate and effective taboos, it can be sublimated into a sexual martyrdom of which few Americans, including all colors and creeds, are capable, it will express itself in any one of the innumerable aberrancies of the primate sex function; for those too are 'natural.' • • • To demand prolonged continence as the only method of contraception from anyone, who is not stoutly bulwarked by the strongest spiritual sanction is to drive that individual to what society has judged criminal, and which, if practiced by any number of those who should prevent pregnancy for shorter or longer periods, for reasons which have been stated, would disrupt our whole moral order • • • Let those who have moral objection to any interference with coitus, except its denial, practice continence, if by so doing they are not driven to release their sex drive into illicit channels • • •. Forced domestic continence would not be good • • • for society."

Rosenau, Milton J. editor, (Professor Emeritus of Preventive Medicine and Hygiene, Harvard Medical School)—Article on "*Contraception*" by *Eric M. Matsner*, M.D. in Preventive Medicine and Hygiene (6th edition, Appleton-Century, 1935, p. 508):

"Abstinence or continence is a theoretical but not a practical method of contraception for married couples.

The doctor who prescribes it should not be disappointed if the prescription is not taken. Total abstention from the coital act in marriage, although a negative contraceptive measure, may have unfortunate psychologic and physiologic effects except in rare instances."

Smith, Hamblin M. (Medical Officer British Prison Service; author of "The Psychology of the Criminal")—*Some More Medical Views on Birth Control* (New York Dutton, 1928, p. 191):

"When marriage is undertaken the difficulty of sublimation is greatly increased. A man and a woman enter into the most intimate relation imaginable, all our customs tending to emphasize the intimacy of the relation.

"Some of the repressed energy can be sublimated, but not all can be so dealt with. * * * The harm which may result varies in degree from transient restlessness and irritability, to the establishment of the most profound psycho-neurosis. All kinds of anti-social conduct may be occasioned in this way."

Stallworthy, John, M.A. (Oxon), F.R.C.S., F.R.C.O.G., Obstetrician and Gynaecologist, Radcliffe Infirmary, Oxford; Examiner in Midwifery and Gynaecology, Oxford University; Director of the Area Department of Obstetrics and Gynaecology, United Oxford Hospitals; *Kenneth Walker*, M.B., F.R.C.S., Emeritus Urologist, Royal Northern Hospital; Andrologist to the Philip Hill Parenthood Clinic, Royal Northern Hospital; *John Malleson*, M.B., B.S.; Clinical Assistant, Obstetric Unit, University College Hospital, London; Hon. Medical Officer to the Clinic for Sexual Disorders, North Kensington Welfare Centre; *Margaret Hadley Jackson*, M.B., B.S., D.R.C.O.G., Obstetric Consultant to the Devon County Council, Medical Officer to the

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Exeter F.P.A. Contraceptive and Subfertility Clinic. With a Foreword by *Sir Eardley Holland*, M.D., F.R.C.S., F.R.C.P., F.R.C.O.G. *Problems of Fertility in General Practice* (London: Cassell and Company Ltd., 1953, p. 138):

"* * * Thus, the physician who recommends abstention should realize that he may be inflicting a burden far greater than would be involved in the mere deprivation of sexual pleasure. He must face the fact that the efforts to act on his advice may produce symptoms of anxiety neurosis, either in the form of functional ill-health, or in disturbances of temper or disposition."

Stone, Hannah M., M.D., Medical Director, Margaret Sanger Research Bureau and Marriage Consultation Center at the Community Church, New York, and *Abraham Stone*, M.D., Associate Clinical Professor of Preventive Medicine, New York University College of Medicine, Director, Margaret Sanger Research Bureau, Vice-President, Planned Parenthood Federation of America, Medical Director, Marriage Consultation Center at the Community Church, New York *A Marriage Manual* (New York: Simon and Schuster, 1953, pp. 105-106):

"What about self-control, doctor? Would it be advisable for people to abstain altogether from sexual relations when a pregnancy is not desired?"

"Continence is occasionally resorted to for the purpose of preventing conception, and I have records of some married couples who had abstained from sexual contact for months and even years at a time on that account. It is certainly the most effective method for avoiding a pregnancy, yet it is one which cannot be advocated or advised as a general practice."

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"But why not, doctor? Is continence harmful?"

"Well, first of all, because continence is not feasible. Normally sexed individuals, living in the intimate daily contacts of married life, find it very difficult to abstain completely from marital relations. Only people who have an unusually high degree of control over their desires, or, what is more generally the case, those who have a very low degree of sexual drive, are able to refrain from sexual contact with their mates for long periods of time.

"Secondly, because prolonged continence in married life is physiologically and psychologically undesirable. When two people who love each other and live together in the close intimacies of marriage attempt to avoid sexual relations, it inevitably gives rise to marked physical stresses and emotional strains, which are very likely to lead to serious physical and sexual disharmonies and marital conflicts. A satisfactory sex life is essential for a satisfactory marital union, and not many marriages can long survive the complete repression of the sexual instinct."

Williams, J. Whitridge (Former Professor of Obstetrics and Gynecology, Johns Hopkins University) *Indications For Therapeutic Sterilization in Obstetrics* (91 Journal of the American Medical Association, 1241, October 27, 1928):

"It may be argued that * * * continence is the true solution" (to the problem of family limitation) "and that if it cannot be attained the matter is out of our hands.

"If men were angels such advice might hold; but even among the most intelligent and well-meaning I hesitate to recommend continence for too long a time, as I know from experience what it means to give advice which may lead to a blasted marriage."

APPENDIX E

Legal Status of Contraception in the United States and Territories

On the next page is a map showing how the various States and territories have treated the dissemination of contraceptives. The map contains four categories, as follows:

Category I (clear)

Jurisdictions in which there is no statute dealing with the dissemination of contraceptives.

Category II (diagonal lines)

Jurisdictions in which the dissemination of contraceptives is subject only to limited regulations such as restrictions against advertising and/or vending machines, or regulation of prophylactics only.

Category III (crossed lines)

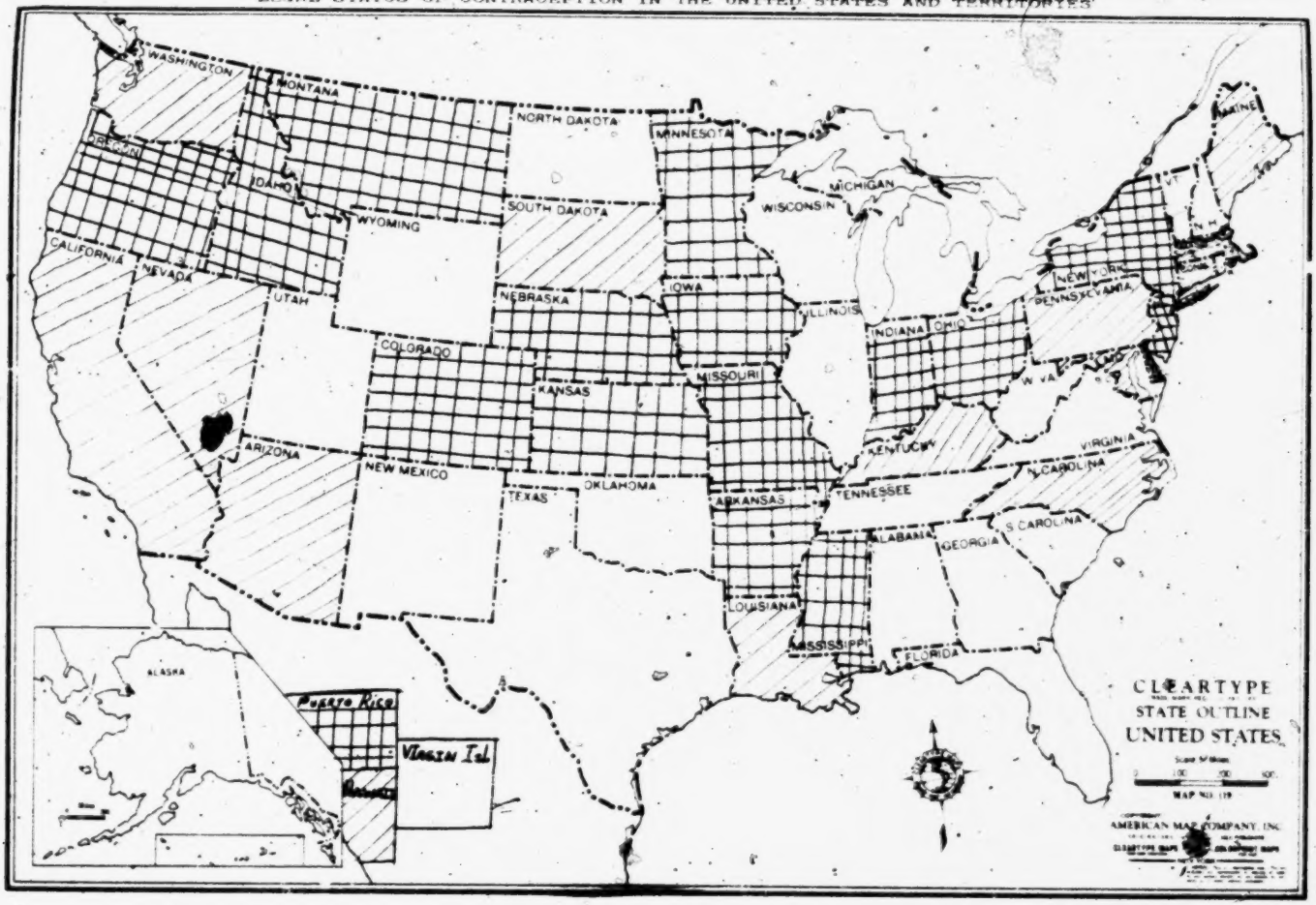
Jurisdictions in which dissemination of contraceptives is permitted only by duly licensed physicians and/or pharmacists.

Category IV (shaded)

Jurisdictions in which the dissemination or use of contraceptives is prohibited.

On the pages following the map there are explanatory notes and statutory citations.

LEGAL STATUS OF CONTRACEPTION IN THE UNITED STATES AND TERRITORIES



3. *Missouri:*

Missouri's statute includes a prohibition against advertising, a clause barring sale or distribution of contraceptive devices, and a clause exempting medical teaching and medical publications. (cf. Kansas, Nebraska) As illustrated in Appendix F several contraceptive services exist within the State.

4. *New Jersey:*

The New Jersey statute prohibits sale, "without just cause" of contraceptive devices. The 1959 case of *State v. Kinney Building Drug Stores, Inc.*, 56 N. J. Super. 37, 151 A. 2d 430 (Essex Co. Ct. 1959) held it unconstitutional in that it did not clearly distinguish legal sales of contraceptives from illegal sales. The case was not appealed. cf. *State v. Tracy*, 29 NJ Super. 145, 102 A(2) 52 (1935); *State v. Kohn*, 42 N. J. Super. 578, 127 A(2) 451 (1956).

Many Planned Parenthood centers exist within the State and one is run on State premises (see Appendix F).

Note to Category IV

Massachusetts:

The Massachusetts statute is a bar to the distribution of contraceptives (not to use). Its scope has been limited so as to exclude druggist' sales of condoms for prophylactic use. *Comm. v. Corbett*, 307 Mass. 7 (1940); *Commonwealth v. Werlinsky*, 307 Mass. 608, 29 N. E. 2d 150 (1940).

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Statutes Concerning Contraception

1. Alabama None
2. Alaska None
3. Arizona Ariz. Rev. Stat. Ann (1956) Tit. 13 §213
4. Arkansas Ark. Stat. (1947) Tit. 82 §§944-949, Tit. 82 §§951-954
5. California Cal. Bus. & Prof. Code Ann. (West 1954 Div. 2 Ch. 4 Art. 5 §601; Div. 2 Ch. 9 Art. 9 §§4301-4325
6. Colorado Colo. Rev. Stat. Ann. (1953) §40-9-17, §§66-10-3—66-10-8, §66-10-12
7. Connecticut Conn. Gen. Stat. (1958 revised) Tit. 53 §32, Tit. 54 §196
8. Delaware Del. Code Ann. (1953) Tit. 16 §§2501-2504
9. District of Columbia No specific District of Columbia statute
10. Federal Statutes 18 U. S. C. §§1461, 1462; 19 U. S. C. §1305, 21 U. S. C. §352
11. Florida None
12. Georgia None
13. Hawaii Hawaii Rev. Laws (1955) Tit. 21 §455-73, Tit. 31 §§302A-1—302A-3
14. Idaho Idaho Code Ann. (1948) Tit. 18 §603, Tit. 39 §§801-810
15. Illinois None cf. Ill. Rev. Stat. C. 127 §55.13
16. Indiana Ind. Ann. Stat. (Burns Supp. 1959) Tit. 10 §§2803, 2804, Tit. 9 §601
17. Iowa Iowa Code Ann. (1950) Tit. 35 §§725.5—725.10

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18. Kansas Kan. Gen. Stat. Ann. (1949) Ch. 21 §1101

19. Kentucky Ky. Rev. Stat. (1959) Tit. 18 §§214.190-214.270

20. Louisiana La. Rev. Stat. Ann. (1950) Tit. 14 §88

21. Maine Me. Rev. Stat. Ann. (1954) Ch. 134 §11, Ch. 25 §114

22. Maryland Md. Ann. Code (1957) Art. 27 §41

23. Massachusetts Mass. Ann. Laws (1956) Tit. 1 §§20, 21

24. Michigan Mich. Stat. Ann. (1956) Tit. 14 §§353(1)-353(5), Tit. 28 §229.40, Tit. 15 §3782

25. Minnesota Minn. Stat. Ann. (1947) Ch. 617 §§25, 26

26. Mississippi Miss. Code Ann. (1956) Tit. 11 §2289

27. Missouri Mo. Rev. Stat. (1949) Tit. 38 §563.300

28. Montana Mont. Rev. Codes Ann. (1947) Tit. 94 §3609, Tit. 94 §§3616-3619

29. Nebraska Neb. Rev. Stat. (Reissue 1956) Ch. 28 §423, Ch. 71 §§1104-1114

30. Nevada Nev. Rev. Stat. (1957) Tit. 16 §202.190, Tit. 16 §§202.210-202.230

31. New Hampshire None

32. New Jersey N. J. Stat. Ann. (Supp. 1955) Tit. 2A §170-76

33. New Mexico N. M. Stat. Ann. (1953) Ch. 12 §3-7

34. New York N. Y. Pen. Law Art. 106 §§1142, 1143, 1145

35. North Carolina N. C. Gen. Stat. (1935) Ch. 14 §194

36. North Dakota None

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37. Ohio Ohio Rev. Code Ann. (Page 1953) Tit. 29 §§2905.32-2905.37

38. Oklahoma None

39. Oregon Ore. Rev. Stat. (1955) Tit. 36 §§435.010-435.110

40. Pennsylvania Pa. Stat. Ann. (Purdon 1945) Tit. 18 §4523

41. Rhode Island None

42. South Carolina None

43. South Dakota S. D. Code (1952) Tit. 13 §1726

44. Tennessee None

45. Texas None

46. Vermont Vt. Rev. Stat. (1947) Tit. 36 §7323

47. Virginia None

48. Utah Utah Code Ann. (1953) Tit. 58 §§19-1(f), 19-2—19-10.

49. Washington Wash. Rev. Stat. (1952) Tit. 9 §68.030, Tit. 18 §81.010(4), Tit. 18 §§81.020, 81.025, 81.030, 81.040, 81.050, 81.060, 81.065, 81.070, 81.080

50. West Virginia None

51. Wisconsin Wis. Stat. (1955) Tit. 15 §151.15

52. Wyoming None

53. Virgin Islands None

54. Puerto Rico P. R. Laws Ann. (1955) Tit. 33 §§1051, 1052, Tit. 24 §§201-203, Tit. 10 §315.

APPENDIX F

Location of Planned Parenthood and Public Health Contraceptive Services in the United States

The map in this Appendix shows the location of contraceptive services rendered by Planned Parenthood affiliates and public health agencies. The map does not show those contraceptive services rendered by such groups as hospitals, private physicians, other private agencies and the like.

The dots in the states marked with horizontal lines indicate the locations where contraceptive services are rendered by the Planned Parenthood Affiliates:

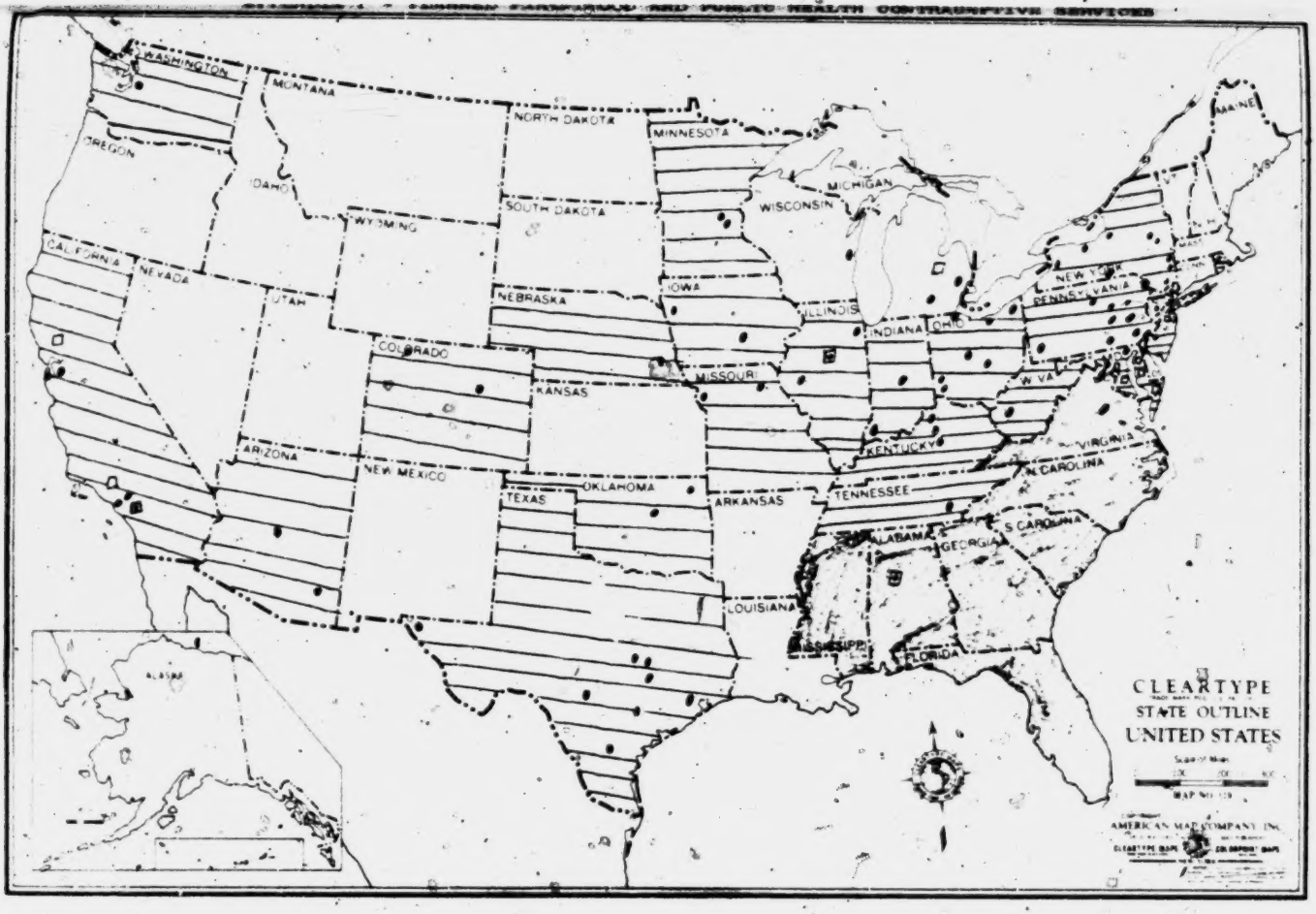
Alabama: Birmingham; Arizona: Phoenix, Tucson; California: Los Angeles, Oakland, Pasadena, San Francisco, Whittier; Colorado: Denver; Delaware: Wilmington; District of Columbia; Illinois: Champaign, Chicago, Springfield (Referral service to private physicians); Indiana: Evansville, Indianapolis; Iowa: Des Moines, Sioux City; Kentucky: Berea, Lexington, Louisville; Maryland: Baltimore, Silver Spring; Michigan: Ann Arbor, Detroit; Minnesota: Minneapolis, St. Paul; Missouri: Kansas City, St. Louis; Nebraska: Omaha; New Jersey: Asbury Park, Camden, Englewood, Morristown, Newark, Paterson, Plainfield, Princeton, Westfield (Referral service to private physicians); New York: Albany, Babylon, Binghamton, Brooklyn, Buffalo, Far Rockaway, Huntington, Jamaica, Kingston, Mineola, Mount Kisco, Mount Vernon, Newburgh, New York City, Niagara Falls, Port Chester, Poughkeepsie, Rochester, Schenectady, Syracuse, Yonkers; Ohio: Cincinnati,

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Cleveland, Columbus, Hamilton, Springfield, Toledo, Youngstown; Oklahoma: Oklahoma City, Tulsa; Pennsylvania: Easton, Lancaster, Philadelphia, Pittsburgh, Reading, Scranton, Stroudsburg, Wilkes-Barre, York; Rhode Island: Providence; Tennessee: Chattanooga; Texas: Austin, Dallas, El Paso, Ft. Worth, Houston, San Angelo, San Antonio, Waco; Virginia: Richmond; Washington; Seattle; West Virginia: Parkersburg; Wisconsin: Milwaukee.

(See *List of Affiliates*, published by Planned Parenthood Federation of America, Inc., August, 1960)

The shaded areas show the states with public health contraceptive services.


WASHINGTON
MONTANA
NORTH DAKOTA
MINNESOTA
MAINE
OREGON
IDAHO
SOUTH DAKOTA
MICHIGAN
WISCONSIN
WYOMING
CALIFORNIA
NEVADA
UTAH
NEBRASKA
IOWA
ILLINOIS
INDIANA
OHIO
NEW YORK
PENNSYLVANIA
COLORADO
KANSAS
MISSOURI
W. VA.
KENTUCKY
VIRGINIA
ARIZONA
NEW MEXICO
OKLAHOMA
TEXAS
ARKANSAS
TENNESSEE
N. CAROLINA
ALABAMA
GEORGIA
S. CAROLINA
LOUISIANA
MISSISSIPPI
FLORIDA
ALASKA
CLEARTYPE
STATE OUTLINE
UNITED STATES
AMERICAN MAP COMPANY, INC.

APPENDIX G

Attached as Appendix G is a "Selected Bibliography of Contraception, 1940-60, edited by Christopher, Tietze, M. D., published by the National Committee on Maternal Health, Inc in 1960.

Selected Bibliography of Contraception

1940 - 1960

Publication No. 6

SELECTED BIBLIOGRAPHY OF CONTRACEPTION: 1940-1960

edited by CHRISTOPHER TIETZE, M.D.

National Committee on Maternal Health, Inc.

2 East 103 Street
New York 29, New York

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INTRODUCTION

This Bibliography of Contraception covers the medical and sociological literature, including books, chapters of books, conference papers, and journal articles, published in the languages of Western Europe from 1940 to the early part of 1960. In separating the field of contraception from basic research in human and animal reproduction, it has been our intention to include primarily those studies which are directly relevant to clinical application.

In general, the following types of material have been omitted: (1) laws and legal literature; (2) religious and sectarian literature; (3) books and pamphlets written primarily for lay readers and articles in newspapers or popular magazines; (4) activity and financial reports of family planning organizations; (5) "house organs" of pharmaceutical manufacturers; (6) correspondence and editorial comment; and (7) publications on surgical sterilization, which will be the subject of a separate bibliography.

The languages covered, in addition to English, are Danish, Dutch, French, German, Italian, Norwegian, Portuguese, Spanish, and Swedish. Facilities for the inclusion of publications in other languages were inadequate. All titles in languages other than English are followed by an underlined translation and those which do not clearly indicate the subject matter of the study carry a brief annotation, both in parentheses. For a few important books, contents (chapters) are listed.

The body of the bibliography, pages 1-76, including items in the reference file of the National Committee on Maternal Health as of July 1, 1960, is arranged alphabetically by name of single or senior author and date of publication. Republications of an item are listed immediately after the first entry, preceded by the word "Also." Journal articles are identified by volume number, pagination, and date of issue. Names of secondary authors are cross-referenced.

Books and other publications of continuing importance are indicated by an asterisk. In making this selection, the editor

has received valuable suggestions from several colleagues. To the extent that the selection reflects his own interests and preferences, he must accept the responsibility for all errors of judgment.

Thanks are due to Sarah Lewit, Lussia Neumann, and especially Ruth Brown, on the staff of the National Committee on Maternal Health, who assisted in the preparation of this bibliography

While we have tried to make this Bibliography of Contraception as comprehensive as possible within self-imposed limitations of scope and time, we cannot claim to have compiled a truly complete list. We believe that better coverage has been achieved for the more recent years (except 1960) than for the earlier part of the period. We will be grateful to readers who will bring errors and omissions to our attention, as it is our intention to publish supplementary lists at appropriate intervals.

The Editor

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IN THE

Supreme Court of the United States

October Term, 1960

Nos. 60-61

POE, [illegible], and [illegible] LEE BUXTON,

Appellants,

v.

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

On Appeal from the Supreme Court of Errors of Connecticut

MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CONNECTICUT CIVIL LIBERTIES UNION AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

Osmond K. Fraenkel,
120 Broadway,
New York, N. Y.

Jeremy E. Cullen,
[illegible] Lewis Street,
Hartford, Conn.

Attorneys for Amici

[illegible] Wallace,
[illegible] Emerson,
Melvin L. Wulf,
Of Counsel.

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ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

On Appeal from the Supreme Court of Errors of Connecticut

Motion for Leave to File a Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as *Amici Curiae*

The American Civil Liberties Union and its affiliate, the Connecticut Civil Liberties Union, respectfully move for leave to file a brief *amici curiae* in these cases. The attorney for appellants has consented to the filing. Appellee's attorney has refused consent. Both the consent and refusal have been filed with the Clerk of the Court.

The American Civil Liberties Union is a national non-political organization devoted solely to defending the civil liberties guaranteed by the constitutions of the United States and the several states. The Connecticut Civil Liberties Union is an affiliate group which concentrates on the civil liberties of the citizens of Connecticut.

For many years the Union maintained that state and federal laws which interfered with the dissemination of birth control information impaired the freedoms of speech and information protected by the First Amendment.

Motion for Leave to File a Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae

Subsequently the Union re-evaluated its policy and concluded in addition that any prohibition against the prescription, sale or use of birth control articles was a serious abridgement of the due process clauses of the Fifth and Fourteenth Amendments.

The Union believes that from the point of view of appellants Poe's and Doe's right to privacy and appellant Buxton's right to professional integrity, its brief can be of assistance to the Court in settling another dispute arising out of conflicting claims between a state and its citizens. The Union believes its brief covers ground not covered in appellants' brief.

The Union respectfully moves that it be granted leave to file the accompanying brief.

Osmond K. Fraenkel,
120 Broadway,
New York, N. Y.,

Jerome E. Caplan,
87 Lewis Street,
Hartford, Conn.,

Attorneys for Amici.

Rowland Watts,
Ruth Emerson,
Melvin L. Wulf,
Of Counsel.

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ABRAHAM S. ULLMAN, State's Attorney,

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On Appeal from the Supreme Court of Errors of Connecticut

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE CONNECTICUT CIVIL LIBERTIES UNION AS *AMICI CURIAE*

Interest of *Amici*

The interest of *amici* is set forth in the motion for leave to file.

Statutes Involved

General Statutes of Connecticut, Revision of 1958:

Section 53-32. Any person who uses any drug, medical article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or both fined and imprisoned.

Section 54-196. Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.

Statement of the Case

Appellants Poe are husband and wife, 30 and 26 years old respectively. Mrs. Poe has had three consecutive pregnancies, each of which has terminated in an infant with multiple congenital abnormalities inconsistent with life. Another such pregnancy will be extremely disturbing to the physical and mental health of Mr. and Mrs. Poe (R. 2).[a]

Appellant Doe is a 25 year old housewife. She suffers from hypertensive cardiovascular disease, severe paresis of the right leg, total paralysis of the right arm, residual kidney damage, marked impairment of speech, and emotional instability. If appellant Doe became pregnant it would almost inevitably result in her death from hypertensive toxemia of pregnancy (R. 6).

Appellant Buxton is a licensed physician specializing in obstetrics and gynecology. He is Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine and the Grace-New Haven Community Hospital (R. 10-11).

Both Mrs. Poe and Mrs. Doe have consulted Dr. Buxton for medical advice as to what preventative measures can be taken to avert the occurrence of the dangerous conditions described above (R. 12).

It is the opinion of Dr. Buxton that the best and safest medical advice which could be prescribed for Mrs. Poe and Mrs. Doe would be to inform them of methods of preventing conception. Dr. Buxton has knowledge of drugs, medicinal articles and instruments which in fact can be used in a safe, sanitary, and effective manner so as, without injury, to prevent conception and avert the dangerous consequences earlier described. The use of such drugs and instruments, from a medical standpoint, is indicated as the

[a] The designation "R." refers to the Record on Appeal.

best and safest preventative measure necessary for the protection and preservation of the health of appellants Poe and Doe (R. 2-3, 12).

Appellants Poe and Doe are unable to obtain this advice solely because the delivery and use of such advice may or will be claimed by the appellee, State's Attorney, to violate Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, and the appellee intends to prosecute any offense against said statutes, and claims that the giving of information and advice and the procurement and delivery of drugs, articles and instruments and the use thereof, would violate said statute (R. 3, 12).

Questions Presented

I. Whether Section 53-32, both on its face and as applied in this case, arbitrarily invades the privacy of appellants Poe and Doe and thereby violates the due process clause of the 14th Amendment.

II. Whether Sections 53-32 and 54-196, both on their face and as applied in this case, unreasonably interfere with appellant Buxton's right to practice his profession and thereby violate the due process clause of the 14th Amendment.

Summary of Argument

The 14th Amendment protects persons from invasions of their privacy by the states. The Connecticut statutes in issue, on their face, seek to regulate an aspect of marital conduct that is inherently private and beyond the reach of government. As applied, those statutes assert the power to withdraw from appellants the right to engage in sexual intercourse. This asserted power is in such complete conflict with accepted medical practice and with the vastly overwhelming practice of the community, that it is arbitrary and therefore unconstitutional.

These statutes also unreasonably interfere with appellant Buxton's right to practice his profession, a right protected by the 14th Amendment. Dr. Buxton's liberty is further infringed because the nature of his work is entitled to the special considerations expounded in *Sherbert v. New Hampshire*, 354 U. S. 234.

ARGUMENT

I

Section 53-32 of the General Statutes of Connecticut, Revision of 1958, both on its face and as applied in this case, arbitrarily invades the privacy of appellants Poe and Doe and thereby violates the due process clause of the 14th Amendment.

A. The Right to Privacy

The right to privacy is protected against invasion by the States through the 14th Amendment. *Wolf v. Colorado*, 338 U. S. 25. The Court there held that "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause." 338 U. S. at 27.

It was Mr. Justice Brandeis' view that privacy was the keystone of the Constitution. Dissenting in *Olmstead v. United States*, 277 U. S. 438, 478, he said:

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They know that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations.

> They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment."

Although the Court has often considered cases arising out of the application of the search and seizure provision of the Constitution to both the federal and state governments it has not had occasion to consider a case raising the question of the extent of the right to privacy in circumstances which touch the marrow of human behavior as presented in this case.

The invasion of privacy here is two-fold. First, the statute on its face restrains married couples from employing the most effective means of contraception when engaged in sexual intercourse. Secondly, as applied, the statute confronts appellants with the choice of engaging in sexual intercourse without contraceptive devices, thereby immediately threatening the life and health of the female spouses, or of abstaining entirely from sexual intercourse.

1. With respect to the first, it can be safely observed that marriage and the family are the foundations of our culture, and the focal points about which individual lives revolve.[1]

That certain aspects of marriage and family life are subject to the reasonable exercise of the police power is not in dispute, but that power is generally restricted to assuring minimum standards of care and education.[2] The

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[1] Mr. Justice Frankfurter, commemorating Judge Learned Hand's fifty years of federal judicial service, said of Judge Hand that "he has achieved the one thing in life that makes all the rest bearable—a happy marriage." 264 F. 2d 21 (foreword).

[2] See, *e.g.*, Connecticut General Statutes, Revision of 1958, § 17-32 *et seq.* (Dependent and Neglected Children); § 53-304 (Non-support); § 53-309 (Abandonment); § 10-184 (School Attendance; Duties of Parents).

incidents of marriage and family life that are the private concern of the family itself, and consequently beyond the reach of the government, are numerically overwhelming.

Among those inviolable incidents of marriage, and the human love on which it is based, is the right to express that love through sexual union, and the right to bear and raise a family. No other rights are entitled to greater privacy than that normally bestowed upon the acts of intercourse and procreation. Nonetheless, Connecticut has presumed to assert the power to regulate the conduct of its citizens by notifying them that although the state will tolerate sexual intercourse between spouses, it will not tolerate such intercourse, unless they abstain from the practice of regulating the frequency of pregnancy. They must, says Connecticut, forbear from planning the size of their family regardless of their physical condition, their desires or their means.

2. As applied in this case, the unreasonableness of the Connecticut statute is manifestly established. As stated above, a husband and wife, resident in Connecticut, who can procreate and bear children without undue danger, may engage in sexual intercourse or not, contingent upon their willingness to take the chance that pregnancy will occur. Appellants Poe and Doe, however, have no such choice. In each case, pregnancy will pose an immediate threat to the health of the mother; in one case the mother's death is likely to result. The choice here is no choice at all, because if the most effective means of contraception is denied these appellants, they must forbear from sexual intercourse entirely.

To paraphrase Mr. Justice Brandeis, if Connecticut would leave the appellants alone, they would be able to obtain the most effective means of contraception, and engage in sexual intercourse. But Connecticut has so far invaded appellants' privacy that they are foreclosed from engaging in the natural expression of their love.

It is unnecessary to expatiate upon the nature of the liberty which Connecticut has arbitrarily denied to appellants. It is a private expression of love which should properly be beyond invasion or abridgment by the government. "This court has more than once said that the liberty guaranteed by the Fourteenth Amendment embraces 'the right of the citizen to be free in the enjoyment of all his faculties,' and 'to be free to use them in all lawful ways.' *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Adair* v. *United States*, 208 U. S. 161, 173." *Berea College* v. *Kentucky*, 211 U. S. 45, 67-69 (Harlan J., dissenting).

3. This case is not unlike *Rochin* v. *California*, 342 U. S. 165. There, police officers, having some information that Rochin was selling narcotics, broke into his house, entered his bedroom where he was sitting partly dressed on the side of his bed, upon which his wife was lying, and attempted unsuccessfully to extract some capsules he had put in his mouth when the police entered the room. They then took Rochin to a hospital, had his stomach pumped and retrieved the capsules which proved to contain morphine. The capsules were admitted at trial over petitioners objections.

This Court reversed the conviction, finding that the conduct of the police "shock[ed] the conscience," offended "a sense of justice," and violated "decencies of civilized conduct,"[2a] and therefore violated the due process clause of the 14th Amendment. The power asserted by Connecticut to withdraw from its citizens the right freely to use effective means of contraception and thereby limit the size of their family in accordance with their personal choice, or to withdraw from appellants the right to engage in sexual intercourse without threatening the health or lives of the female spouses, evokes the same quality of outrage to civilized sensibilities as did the power asserted in *Rochin*. The shocking nature of the exercise of state power is, perhaps, greater here than in *Rochin*.

[2a] 342 U. S. at 172, 173.

Appellants want only to enjoy their mutual love and affection without any interference by the State. The right to which they claim title intrudes not at all upon any valid interest or conflicting right of their fellow citizens. They assert this right to be one of those which "may not be submitted to vote * * * [and] depend[s] on the outcome of no elections."[3] In short, they want legislators as well as policemen to stay out of their bedrooms.

B. Privacy and Due Process of Law.

1. The Statute on its Face.

Although the nature of the constitutional right to privacy has generally been discussed by this Court in its application to questions of search and seizure, four cases decided here raise related considerations, not necessarily in the context of the right to privacy, but within the general framework of a conflict between the police power of the state and a private right related to conjugal or domestic matters.

In *Meyer* v. *Nebraska*, 262 U. S. 390, a state statute forbidding foreign languages to be taught in primary schools within the state was held arbitrary and in violation of the 14th Amendment. In the course of its opinion the court described the "liberty" guaranteed by the 14th Amendment as follows:

> "Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." At 399.

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[3] *West Virginia* v. *Barnette*, 319 U. S. 624, 638.

In *Pierce v. Society of the Sisters of the Holy Names*, 268 U. S. 510, this Court struck down as contrary to the due process clause of the 14th Amendment, a state statute which required children between the ages of eight and sixteen to attend public schools. The Court said:

> "We think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the up-bringing and education of children under their control. * * * The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." At 534-35.

Meyers and *Pierce* sustain the conclusion that the law, to a large extent, regards marriage and the family as the ultimate repository of personal freedom, and that the power vested in husband and wife to conduct the affairs of their family free of state interference is virtually plenary.

The relatively narrow area of control left to the government[4] may not be exercised arbitrarily and, as stated in *Pierce*, when that power is exercised it must have a "reasonable relation to some purpose within the competency of the state".[5] With this limitation in mind, we shall discuss two cases, each of which, although affirming the power of the state to qualify somehow the liberty of the person, affords significant guidelines for measuring the constitutionality of the power asserted in this case.

In *Reynolds v. United States*, 98 U. S. 145, this Court affirmed a conviction for bigamy against a member of the

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[4] See, *e.g.*, note 2, *supra*.

[5] 268 U. S. at 535.

Church of the Latter Day Saints brought under a federal statute which the defendant claimed violated the constitutional guarantee of the free exercise of religion. Tracing the persistence of monogamy from ancient times through the Common Law, the Court, in affirming the conviction, relied primarily upon the high place held by monogamy in the culture of the western world, and concluded that "* * * it may safely be stated there has never been a time in any state of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity." 98 U. S. at 165.

In *Jacobson* v. *Massachusetts*, 197 U. S. 11, plaintiff in error was convicted, pursuant to a state statute, of refusing to be vaccinated subsequent to the adoption of a regulation by the board of health of the city of Cambridge that in its opinion the public health and safety required the vaccination or re-vaccination of all the city's residents. He claimed the Massachusetts statute violated the due process clause of the 14th Amendment.

At trial, plaintiff in error's offer of proof relating to the alleged injurious or dangerous effects of vaccination was rejected. Describing the offers of proof as having "no purpose except to state the general theory of those of the medical profession who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body," at 30, Mr. Justice Harlan said, "*What everybody knows the court must know, and therefore the state court judicially knew, as this court knows, that an opposite theory accords with the common belief, and is maintained by high medical authority.*" *Ibid.* (Emphasis supplied.) It was on the basis of this judgment that the court concluded that the statute was not in "palpable conflict with the Constitution." At 31.

The court also quoted with approval the following language from a then recent New York case, *Viemester* v. *White*, 179 N. Y. 235:

> "While [vaccination] is not accepted by all, it is accepted by the mass of the people, as well as by most members of the medical profession. It has been general in our state, and in most civilized nations for generations. It is generally accepted in theory, and generally applied in practise both by the voluntary action of the people, and in obedience to the command of the law. Nearly every state in the Union has statutes to encourage, or directly or indirectly to require, vaccination; and this is true of most nations in Europe * * *. A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the Legislature and the courts * * *."

Reynolds and *Jacobson*, therefore, stand for the proposition that where a norm of conduct reflects the overwhelmingly prevailing ethic or belief of the community, legislation which implements that view is reasonable almost by definition. More particularly, *Jacobson* stands for the further proposition that a compelling standard to be used in judging the reasonableness of legislation that purports to regulate the health or general welfare of the community is whether the means employed accord with the consensus of opinion of the experts in the field of science to which the measure relates.

Moreover, in each of those cases the matter regulated had a public aspect—in the one case the flaunting of multiple wives, in the other the possible infection of others. Here no such public interest exists.

Although overwhelming lay opinion or belief is not sufficient by itself to determine the reasonableness of legislation, where such opinion or belief coincides with the opinion of experts in the science to which the legislation relates, the area of reasonableness within which the legislature may operate is narrower than normal, both practically and constitutionally. For example, the opinion of the lay and scientific community concerning the efficacy of antibiotics is no doubt virtually unanimously favorable. One

is hard put to imagine that state legislation prohibiting the use of such drugs would not be struck down today as patently arbitrary and capricious.

From a medical standpoint, the safety and utility of contraceptives in general, and the vaginal diaphragm in particular, are beyond dispute.[6] That they in fact contribute to physical and emotional health is dramatically illustrated by the facts of this case. This view is shared by the community at large.[7]

From the moral or ethical standpoint,[7a] if the use of contraceptives were as taboo in our society as polygamy, the reasonableness of state legislation restricting their use could be well argued on the authority of the *Reynolds* case. But that is not the case. On the contrary, birth control through contraceptives devices is not only widely practised but far from being *malum in se*, is not even prohibited in forty-five of the fifty states.[8]

If any proof other than common experience and observation is required to show that birth control is generally practiced in the United States, it is instructive to note that of 43,714,000 family units in the nation, all but 2,648,000 are composed of six or less persons including parents, children, and other relations who might be in residence.[9] Indeed, approximately seventy-five per cent of all family units, all but 11,045,000, are composed of four people or less.[10] It is fair to assume from this data that the relatively

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[6] Appellants' brief; *passim.*

[7] See, *e.g.*, St. John Stevas, *Birth Control and Public Policy* (Fund for the Republic, 1960) 26-28.

[7a] The court below grounded its decision in part upon the power of the state to "guard the public morals" (R. 29).

[8] The statutes are collected in St. John-Stevas, op. cit., *supra*, at 82-83. Twenty states and the District of Columbia have no laws whatever interfering with the sale of contraceptives; seventeen states permit contraceptives to be sold on medical prescription; eight states forbid only advertising of contraceptives.

[9] United States Statistical Abstract. 1959, p. 43.

[10] *Ibid.*

small size of the average American family is not attributable to chance.

Further proof of the arbitrary nature of the statutes in issue is adduced from the bemusing fact that condoms, which may be used to prevent veneral disease, are available within the state.[11] If these statues are intended to regulate the moral conduct of Connecticut's citizens, one can only wonder how the Legislature rationalizes the availability of this device which prevents conception as well as disease and which is the kind of device that one bent on immorality can secure with the greatest of ease.

2. The Statute as Applied.

The opinion of the Court in *Jacobson* v. *Massachusetts* is remarkably prophetic as applied to the facts of this case. The following extended quotation from that case speaks for itself.

> "Before closing this opinion we deem it appropriate, in order to prevent misapprehension as to our views, to observe—perhaps to repeat a thought already sufficiently expressed, namely—that the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong oppression. Extreme cases can be readily suggested. Ordinarily such cases are not safe guides in the administration of the law. It is easy, for instance, to suppose the case of an adult who is embraced by the mere words of the act, but yet to subject whom to vaccination in a particular condition of his health or body would be cruel and inhuman in the last degree. We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended,

[11] See *Tileston* v. *Ullman*, 129 Conn. 84, citing with apparent approval *Commonwealth* v. *Corbett*, 307 Mass. 17.

that the judiciary would not be competent to interfere and protect the health and life of the individual concerned. 'All laws,' this court has said, 'should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.' *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278; *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58, 36 L. ed. 340, 344, 12 Sup. Ct. Rep. 517. Until otherwise informed by the highest court of Massachusetts we are not inclined to hold that the statute establishes the absolute rule that an adult must be vaccinated if it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination, by reason of his then condition, would seriously impair his health, or probably cause his death. No such case is here presented. It is the cause of an adult who, for aught that appears, was himself in perfect health and a fit subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation adopted in execution of its provisions for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease." 197 U. S. at 38, 39.

The caveat laid down by Mr. Justice Harlan applies precisely to the facts of this case.

II

Sections 53-32 and 54-196 of the General Statutes of Connecticut, revision of 1958, on their face and as applied to appellant Buxton, unreasonably interfere with appellant's right to practice his profession, and thereby violate the due process clause of the 14th Amendment.

The constitutional provision here invoked by the appellant was described by this Court in the following terms in *Meyer* v. *Nebraska*, 262 U. S. 390 (1923) (quoted in part above) where the statute in question limited the teaching of foreign languages in primary schools.

> "While the court has not attempted to define with exactness the liberty thus guaranteed by the [14th Amendment], the terms has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen • • • [citation of cases]. The established doctrine may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton* v. *Steele*, 152 U. S. 133, 137." [1]

Medicine, like education, is subject to reasonable regulation by the state because it significantly affects the

[1] *Meyer* v. *Nebraska*, at 399-400.

welfare of the community at large. The legislative power must, of course, be reasonably exercised in all cases, but particularly so with respect to measures peculiarly within the expertise of a scientific profession.

The principle regulations imposed by the state relating to the practice of medicine are those which require a demonstration of adequate knowledge and skill before a physician may treat the public.[2] Such regulations are, of course, necessary and reasonable.

> "Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other as well as their influence upon the mind. * * * " *Dent* v. *West Virginia*, 129 U. S. 114, 122 (1889).

The standards set down by, and the administration of, such regulations of course are those of the medical profession itself,[3] since laymen of the state legislature would not presume to judge the professional qualifications of a man claiming the right to practice medicine.

After being licensed, a physician may legitimately be required to submit to other kinds of regulation. He is required, for example, to keep records of his dispensation of narcotics.[4]

In these instances the regulation is intended either to protect the public from treatment which does not meet generally accepted modern medical standards, or to restrict

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[2] Connecticut General Statutes, Revision of 1958, Title 20, Ch. 370.

[3] *Ibid.*

[4] Conn. Gen. Stat., § 19-252.

the use of a potentially dangerous substance to the purposes approved by medical science. In none of these regulations does the state attempt to interfere with the right of the licensed physician to treat his patients in accordance with his best medical judgment or substitute its judgment in a medical matter for that of the physician. As this Court pointed out in the *Dent* case:

> "The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications • • •" *Dent* v. *West Virginia, supra,* at 222-223.

The right of a physician to practice his profession without unnecessary interference by the state, like the right of every man "to work for a living in the common occupations of the community • • • [is] of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax* v. *Raich* 239 U. S. 33 (1915). See also *Meyer* v. *Nebraska, supra,* at 399; *Smith* v. *Texas,* 233 U. S. 630, 636 (1914); *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589-90 (1897); *Lawton* v. *Steele, supra.*

But it is more than this. Because the physician is engaged in a practicing science, his profession shares some of the special needs for freedom of inquiry and practice which come under the name of academic freedom. The preservation of this spirit of free inquiry is as vital to the development of medical science as it is to academic freedom. In medicine as in education "it is important • • • to attract men of the greatest capacity, and to

encourage them to exercise their independent judgment."[5] As this Court has said, academic freedom is an area "in which the government should be extremely reticent to tread." *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957).

The necessity of strong justification for such presumptively harmful action by the state was pointed out by Justice Frankfurter in the *Sweezy* case:[6]

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling. * * *
>
> 'Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scien-

[5] Testimony of Robert M. Hutchins, Associate Director of the Ford Foundation, November 25, 1952, in Hearings before the House Select Committee to Investigate Tax-exempt Foundations and Comparable Organizations, pursuant to HR561, 82nd Cong., 2d Sess., quoted by Justice Frankfurter in *Wieman* v. *Updegraff*, 344 U. S. 183, 197 (1952).

[6] 354 U. S. at 261-263.

tific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university. • • • ,

See also *Wieman* v. *Updegraff*, 344 U. S. 183, 195-98 (1952).

CONCLUSION

The judgment of the Supreme Court of Errors of Connecticut should be reversed.

Respectfully submitted,

OSMOND K. FRAENKEL,
120 Broadway,
New York, N. Y.,

JEROME E. CAPLAN,
37 Lewis Street,
Hartford, Conn.,

Attorneys for Amici.

ROWLAND WATTS,
RUTH EMERSON,
MELVIN L. WULF,
Of Counsel.

COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 61

C. LEE BUXTON,

Appellant,

v.

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT

OBJECTIONS TO MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF AS AMICI CURIAE

For Doctors Willard Allen, Allan C. Barnes, Robert H. Barter, Ralph C. Benson, Willis E. Brown, Charles Iverson Bryans, Jr., Bayard Carter, Roland Cron, John D. Cross, M. E. Davis, Gordon W. Douglas, R. Gordon Douglas, Nicholas J. Eastman, James H. Ferguson, Stanley T. Garber, George H. Gardner, Arthur L. Haskins, Douglas M.

(continued on inside front cover)

ALBERT L. COLES
Attorney General
State Capitol Building
Hartford, Connecticut
Attorney for Appellee

RAYMOND J. CANNON,
Assistant Attorney General
Of Counsel.

(Continued from front cover)

Haynes, Louis M. Hellman, L. L. Hester, R. G. Holly, Carl P. Huber, Edward C. Hughes, W. Nicholas Jones, Irwin H. Kaiser, A. E. Kanter, William C. Keetel, Robert A. Kimbrough, Jr., Kermit Krantz, Ralph E. Leigh, Frank R. Lock, Curtis J. Lund, John S. Lyle, John Van Sicklen Maeck, Milton McCall, William J. McGanity, J. L. McKelvey, Charles E. McLennan, T. L. Montgomery, D. G. Morton, Robert E. L. Nesbitt, Jr., Michael Newton, E. Edson Nichols, Ernest W. Page, Langdon Parsons, N. F. Paxson, Franklin L. Payne, Ben Peckham, Mary DeWitt Pettit, Jack Pritchard, Harry Prystowsky, Clyde L. Randall, Duncan E. Reid, Seymour L. Romney, R. A. Ross, Philip C. Schreier, Charles S. Stevenson, Martin L. Stone, E. Steward Taylor, Howard C. Taylor, Richard W. TeLinde, W. N. Thornton, Jr., John Ullery, Frank E. Whitacre, Seward H. Wills, J. Robert Willson.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 61

C. LEE BUXTON,

Appellant,

v.

ABRAHAM S. ULLMAN, State's Attorney,

Appellee.

OBJECTIONS TO MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

In the above-entitled case, the appellee objects to the motion to file a brief as amici curiae in behalf of the sixty-six physicians heretofore named for the following reasons:

1. Sections 53-32 and 54-196 of the General Statutes of Connecticut, Revision of 1958, are of local application and do not affect any of the aforesaid sixty-six physicians since they are nonresidents of the State of Connecticut.

2. The said sixty-six physicians cannot challenge the constitutionality of the Connecticut statutes, namely, said Sections 53-32 and 54-196, because they have not shown that they or any of them are injured by the operation of said statutes, particularly since they do not claim to practice their profession in the State of Connecticut. *Barrows et al v. Jackson,* 346 U.S. 249; 73 S. Ct. 1031 (1953); *Tileston v. Ullman, State's Attorney et al,* 318 U.S. 44; 63 S. Ct. 493.

3. The motion for leave to file a brief as amici curiae is in violation of Rule 42 (2) of the Supreme Court of the United States in that the brief of the amici curiae was filed prior to an order of this Court and was not accompanied by a written consent of all parties to the case.

Connecticut Statutes Involved In Instant Case.

Section 53-32 of the General Statutes, Revision of 1958:

"*Use of drugs or instruments to prevent conception.* Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54-196 of the General Statutes, Revision of 1958:

"*Accessories.* Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

Dated: August 24, 1960.

Respectfully submitted,

ALBERT L. COLES,
Attorney General
State Capitol Building
Hartford, Connecticut
Attorney for Appellee.

RAYMOND J. CANNON,
Assistant Attorney General
Of Counsel.

SUPREME COURT OF THE UNITED STATES

Nos. 60 AND 61.—OCTOBER TERM, 1960.

Paul Poe, et al., Appellants, 60 v. Abraham Ullman, State's Attorney. Jane Doe, Appellant, v. Abraham Ullman, State's Attorney. C. Lee Buxton, Appellant, 61 v. Abraham Ullman, State's Attorney.	On Appeals From the Supreme Court of Errors of Connecticut.

[June 19, 1961.]

MR. JUSTICE FRANKFURTER announced the judgment of the Court in an opinion which THE CHIEF JUSTICE, MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER join.

These appeals challenge the constitutionality, under the Fourteenth Amendment, of Connecticut statutes which, as authoritatively construed by the Connecticut Supreme Court of Errors, prohibit the use of contraceptive devices and the giving of medical advice in the use of such devices. In proceedings seeking declarations of law, not on review of convictions for violation of the statutes, that court has ruled that these statutes would be applicable in the case of married couples and even under claim that conception would constitute a serious threat to the health or life of the female spouse.

No. 60 combines two actions brought in a Connecticut Superior Court for declaratory relief. The complaint in the first alleges that the plaintiffs Paul and Pauline

Poe [1] are a husband and wife, thirty and twenty-six years old respectively, who live together and have no children. Mrs. Poe has had three consecutive pregnancies terminating in infants with multiple congenital abnormalities from which each died shortly after birth. Plaintiffs have consulted Dr. Buxton, an obstetrician and gynecologist of eminence, and it is Dr. Buxton's opinion that the cause of the infants' abnormalities is genetic, although the underlying "mechanism" is unclear. In view of the great emotional stress already suffered by plaintiffs, the probable consequence of another pregnancy is psychological strain extremely disturbing to the physical and mental health of both husband and wife. Plaintiffs know that it is Dr. Buxton's opinion that the best and safest medical treatment which could be prescribed for their situation is advice in methods of preventing conception. Dr. Buxton knows of drugs, medicinal articles and instruments which can be safely used to effect contraception. Medically, the use of these devices is indicated as the best and safest preventive measure necessary for the protection of plaintiffs' health. Plaintiffs, however, have been unable to obtain this information for the sole reason that its delivery and use may or will be claimed by the defendant State's attorney (appellee in this Court) to constitute offenses at Connecticut law. The State's attorney intends to prosecute offenses against the State's laws, and claims that the giving of contraceptive advice and the use of contraceptive devices would be offenses forbidden by Conn. Gen. Stat. Rev., 1958, §§ 53–32 and 54–196.[2]

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[1] Plaintiffs in the two cases composing No. 60 sue under fictitious names. The Supreme Court of Errors of Connecticut approved this procedure in the special circumstances of the cases.

[2] As a matter of specific legislation, Connecticut outlaws only the use of contraceptive materials. Conn. Gen. Stat. Rev., 1958, § 53–32 provides:

"*Use of drugs or instruments to prevent conception.* Any person who uses any drug, medicinal article or instrument for the purpose

Alleging irreparable injury and a substantial uncertainty of legal relations (a local procedural requisite for a declaration), plaintiffs ask a declaratory judgment that §§ 53–32 and 54–196 are unconstitutional, in that they deprive the plaintiffs of life and liberty without due process of law.

The second action in No. 60 is brought by Jane Doe, a twenty-five year-old housewife. Mrs. Doe, it is alleged, lives with her husband, they have no children; Mrs. Doe recently underwent a pregnancy which induced in her a critical physical illness—two weeks' unconsciousness and a total of nine weeks' acute sickness which left her with partial paralysis, marked impairment of speech, and emotional instability. Another pregnancy would be exceedingly perilous to her life. She, too, has consulted Dr. Buxton, who believes that the best and safest treatment for her is contraceptive advice. The remaining allegations of Mrs. Doe's complaint, and the relief sought, are similar to those in the case of Mr. and Mrs. Poe.

In No. 61, also a declaratory judgment action, Dr. Buxton is the plaintiff. Setting forth facts identical to those alleged by Jane Doe, he asks that the Connecticut statutes prohibiting his giving of contraceptive advice to Mrs. Doe be adjudged unconstitutional, as depriving him of liberty and property without due process.

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of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

There are no substantive provisions dealing with the sale or distribution of such devices, nor with the giving of information concerning their use. These activities are deemed to be involved in law solely because of the general criminal accessory enactment of Connecticut. This is Conn. Gen. Stat. Rev., 1958, § 54–196:

"*Accessories.* Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

In all three actions, demurrers were advanced, *inter alia*, on the ground that the statutes attacked had been previously construed and sustained by the Supreme Court of Errors of Connecticut, and thus there did not exist the uncertainty of legal relations requisite to maintain suits for declaratory judgment. While the Connecticut Supreme Court of Errors in sustaining the demurrers referred to this local procedural ground, relying on *State* v. *Nelson*, 126 Conn. 412, 11 A. 2d 856, and *Tileston* v. *Ullman*, 129 Conn. 84, 26 A. 2d 582, app. dism'd, 318 U. S. 44, we cannot say that its decision rested on it. 147 Conn. 48, 156 A. 2d 508. We noted probable jurisdiction. 362 U. S. 987.

Appellants' complaints in these declaratory proceedings do not clearly, and certainly do not in terms, allege that appellee Ullman threatens to prosecute them for use of, or for giving advice concerning, contraceptive devices. The allegations are merely that, in the course of his public duty, he intends to prosecute any offenses against Connecticut law, and that he claims that use of and advice concerning contraceptives would constitute offenses. The lack of immediacy of the threat described by these allegations might alone raise serious questions of non-justiciability of appellants' claims. See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 88. But even were we to read the allegations to convey a clear threat of imminent prosecutions, we are not bound to accept as true all that is alleged on the face of the complaint and admitted, technically, by demurrer, any more than the Court is bound by stipulation of the parties. *Swift & Co.* v. *Hocking Valley R. Co.*, 243 U. S. 281, 289. Formal agreement between parties that collides with plausibility is too fragile a foundation for indulging in constitutional adjudication.

The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879. Conn.

Acts 1879, c. 78. During the more than three quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, save in *State* v. *Nelson*, 126 Conn. 412, 11 A. 2d 856. The circumstances of that case, decided in 1940, only prove the abstract character of what is before us. There, a test case was brought to determine the constitutionality of the act as applied against two doctors and a nurse who had allegedly disseminated contraceptive information. After the Supreme Court of Errors sustained the legislation on appeal from a demurrer to the information, the State moved to dismiss the information. Neither counsel nor our own researches have discovered any other attempt to enforce the prohibition of distribution or use of contraceptive devices by criminal process.[3] The unreality of these law suits is illumined by another circumstance. We were advised by counsel for appellant that contraceptives are commonly and notoriously sold in Connecticut drug stores.[4] Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would more quickly invite the attention of enforcement officials than the conduct in which the present appellants wish to engage—the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed. The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books

[3] The assumption of prosecution of spouses for use of contraceptives is not only inherently bizarre, as was admitted by counsel, but is underscored in its implausibility by the disability of spouses, under Connecticut law, from being compelled to testify against one another.

[4] It is also worthy of note that the Supreme Court of Errors has held that contraceptive devices could not be seized and destroyed as nuisances under the State's seisure statutes. See *State* v. *Certain Contraceptive Materials*, 126 Conn. 428, 11 A. 2d 863, decided on the same day as the *Nelson* case.

bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. "Deeply embedded traditional ways of carrying out state policy . . ."—or not carrying it out—" are often tougher and truer law than the dead words of the written text." *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369.

The restriction of our jurisdiction to cases and controversies within the meaning of Article III of the Constitution, see *Muskrat* v. *United States*, 219 U. S. 346, is not the sole limitation on the exercise of our appellate powers, especially in cases raising constitutional questions. The policy reflected in numerous cases and over a long period was thus summarized in the oft-quoted statement of Mr. Justice Brandeis: "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341, 346 (concurring opinion). In part the rules summarized in the *Ashwander* opinion have derived from the historically defined, limited nature and function of courts and from the recognition that, within the framework of our adversary system, the adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity. See *Little* v. *Bowers*, 134 U. S. 547, 558; *California* v. *San Pablo & Tulare R. Co.*, 149 U. S. 308, 314; *United States* v. *Fruehauf*, 365 U. S. 146, 157. In part they derive from the fundamental federal and tripartite character of our national government and from the role—restricted by its very responsibility—of the federal courts, and particularly this Court, within that structure. See the Note to *Hayburn's Case*, 2 Dall. 409; *Massachusetts* v. *Mellon*, 262 U. S. 447; 488–489; *Watson*

v. *Buck*, 313 U. S. 387, 400–403; *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 471.

These considerations press with special urgency in cases challenging legislative action or state judicial action as repugnant to the Constitution. "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Parker* v. *County of Los Angeles*, 338 U. S. 327, 333. See also *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners*, 113 U. S. 33, 39. The various doctrines of "standing," [5] "ripeness," [6] and "mootness," [7] which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations—each having its own "varied application" [8]—of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed, or immediately threatened with harm, by the challenged action. *Stearns* v. *Wood*, 236 U. S. 75; *Texas* v. *Interstate Commerce Comm'n*, 258 U. S. 158; *United Public*

[5] See, *e. g.*, *Braxton County Court* v. *West Virginia*, 208 U. S. 192; *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217; *Fairchild* v. *Hughes*, 258 U. S. 126; *Tileston* v. *Ullman*, 318 U. S. 44; *United States* v. *Raines*, 362 U. S. 17. Cf. *Owings* v. *Norwood's Lessee*, 5 Cranch 344.

[6] See, *e. g.*, *New Jersey* v. *Sargent*, 269 U. S. 328; *Arizona* v. *California*, 283 U. S. 423; *International Longshoremen's Union* v. *Boyd*, 347 U. S. 222. Cf. *Coffman* v. *Breeze Corporations*, 323 U. S. 316.

[7] See, *e. g.*, *San Mateo County* v. *Southern Pacific R. Co.*, 116 U. S. 138; *Singer Mfg. Co.* v. *Wright*, 141 U. S. 696; *Mills* v. *Green*, 159 U. S. 651; *Kimball* v. *Kimball*, 174 U. S. 158; *Tennessee* v. *Condon*, 189 U. S. 64; *American Book Co.* v. *Kansas*, 193 U. S. 49; *Jones* v. *Montague*, 194 U. S. 147; *Security Mutual Life Ins. Co.* v. *Prewitt*, 200 U. S. 446; *Richardson* v. *McChesney*, 218 U. S. 487; *Berry* v. *Davis*, 242 U. S. 468; *Atherton Mills* v. *Johnston*, 259 U. S. 13.

[8] Mr. Justice Brandeis, concurring, in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341, 347.

Workers v. *Mitchell*, 330 U. S. 75, 89–90. "This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into action or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here." *Georgia* v. *Stanton*, 6 Wall. 50, 75, approvingly quoting Mr. Justice Thompson, dissenting, in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 75; also quoted in *New Jersey* v. *Sargent*, 269 U. S. 328, 331. "The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement . . . ." *Massachusetts* v. *Mellon*, 262 U. S. 447, 488.*

This principle was given early application and has been recurringly enforced in the Court's refusal to entertain cases which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims. See, *e. g.*, *Cleveland* v. *Chamberlain*, 1 Black 419; *Wood-Paper Co.* v. *Heft*, 8 Wall. 333. Such cases may not be "collusive" in the derogatory sense of *Lord* v. *Veazie*, 8 How. 251—in the sense of merely colorable disputes got up to secure an advantageous ruling from the Court. See *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U. S. 300, 301. The Court has found unfit for adjudication any cause that "is not in any real sense adversary," that "does not assume the honest

* The *Mellon* cases involved what is technically designated as the problem of "standing," but the concern which they exemplify that constitutional issues be determined only at the suit of a person immediately injured has equal application here. It makes little sense to insist that only the parties themselves whom legislation immediately threatens may sue to strike it down and, at the same time, permit such suit when there is not even a remote likelihood that the threat to them will in fact materialize.

and actual antagonistic assertion of rights' to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court." *United States* v. *Johnson*, 319 U. S. 302, 305. The requirement for adversity was classically expounded in *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, 344–345:

> ". . . The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act."

What was said in the *Wellman* case found ready application in proceedings brought under modern declaratory judgment procedures. For just as the declaratory judgment device does not "purport to alter the character of the controversies which are the subject of the judicial power under the Constitution," *United States* v. *West*

Virginia, 295 U. S. 463, 475, it does not permit litigants to invoke the power of this Court to obtain constitutional rulings in advance of necessity. *Electric Bond & Share Co.* v. *Securities and Exchange Comm'n*, 303 U. S. 419, 443. The Court has been on the alert against use of the declaratory judgment device for avoiding the rigorous insistence on exigent adversity as a condition for evoking Court adjudication. This is as true of state court suits for declaratory judgment as of federal. By exercising their jurisdiction, state courts cannot determine the jurisdiction to be exercised by this Court. *Tyler* v. *Judges of the Court of Registration*, 179 U. S. 405; *Doremus* v. *Board of Education*, 342 U. S. 429. Although we have held that a state declaratory-judgment suit may constitute a case or controversy within our appellate jurisdiction, it is to be reviewed here only "so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below." *Nashville, C. & St. L. R. Co.* v. *Wallace*, 288 U. S. 249, 264. It was with respect to a state-originating declaratory judgment proceeding that we said, in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 471, that "The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the Court . . . ." Indeed, we have recognized, in such cases, that ". . . the discretionary element characteristic of declaratory jurisdiction, and imported perhaps from equity jurisdiction and practice without the remedial phase, offers a convenient instrument for making . . . effective . . ." the policy against premature constitutional decision. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 573, n. 41.

Insofar as appellants seek to justify the exercise of our declaratory power by the threat of prosecution, facts which they can no more negative by complaint and

demurrer than they could by stipulation preclude our determining their appeals on the merits. Cf. *Bartemeyer* v. *Iowa*, 18 Wall. 129, 134–135. It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting. See *Ex parte La Prade*, 289 U. S. 444, 458. If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here. *C. I. O.* v. *McAdory*, 325 U. S. 472, 475. Eighty years of Connecticut history demonstrate a similar, albeit tacit agreement. The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality.

Nor does the allegation by appellants Poe and Doe that they are unable to obtain information concerning contraceptive devices from Dr. Buxton "for the sole reason that the delivery and use of such information and advice may or will be claimed by the defendant State's Attorney to constitute offenses," disclose a necessity for present constitutional decision. It is true that this Court has several times passed upon criminal statutes challenged by persons who claimed that the effects of the statutes were to deter others from maintaining profitable or advantageous relations with the complainants. See, *e. g.*, *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510. But in these cases the deterrent effect complained of was one which was grounded in a realistic fear of prosecution.

We cannot agree that if Dr. Buxton's compliance with these statutes is uncoerced by the risk of their enforcement, his patients are entitled to a declaratory judgment concerning the statutes' validity. And, with due regard to Dr. Buxton's standing as a physician and to his personal sensitiveness, we cannot accept, as the basis of constitutional adjudication, other than as chimerical the fear of enforcement of provisions that have during so many years gone uniformly and without exception unenforced.

Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought. Both these factors justify withholding adjudication of the constitutional issue raised under the circumstances and in the manner in which they are now before the Court.

Dismissed.

MR. JUSTICE BLACK dissents because he believes that the constitutional questions should be reached and decided.

SUPREME COURT OF THE UNITED STATES

Nos. 60 AND 61.—OCTOBER TERM, 1960.

Paul Poe, et al., Appellants, 60 v. Abraham Ullman, State's Attorney. Jane Doe, Appellant, v. Abraham Ullman, State's Attorney. C. Lee Buxton, Appellant, 61 v. Abraham Ullman, State's Attorney.	On Appeals From the Supreme Court of Errors of Connecticut.

[June 19, 1961.]

MR. JUSTICE BRENNAN, concurring in the judgment.

I agree that this appeal must be dismissed for failure to present a real and substantial controversy which unequivocally calls for adjudication of the rights claimed in advance of any attempt by the State to curtail them by criminal prosecution. I am not convinced, on this skimpy record, that these appellants as individuals are truly caught in an inescapable dilemma. The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples. It will be time enough to decide the constitutional questions urged upon us when, if ever, that real controversy flares up again. Until it

does, or until the State makes a definite and concrete threat to enforce these laws against individual married couples—a threat which it has never made in the past except under the provocation of litigation—this Court may not be compelled to exercise its most delicate power of constitutional adjudication.

SUPREME COURT OF THE UNITED STATES

Nos. 60 AND 61.—OCTOBER TERM, 1960.

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[June 19, 1961.]

MR. JUSTICE DOUGLAS, dissenting.

I.

These cases are dismissed because a majority of the members of this Court conclude, for varying reasons, that this controversy does not present a justiciable question. That conclusion is too transparent to require an extended reply. The device of the declaratory judgment is an honored one. Its use in the federal system is restricted to "cases" or "controversies" within the meaning of Article III. The question must be "appropriate for judicial determination," not hypothetical, abstract, academic or moot. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240. It must touch "the legal relations of parties having adverse legal interests." *Id.*, 240–241. It must be "real

and substantial" and admit of "specific relief through a decree of a conclusive character." *Id.*, 241. The fact that damages are not awarded or an injunction does not issue, the fact that there are no allegations of irreparable injury are irrelevant. *Id.*, 241. This is hornbook law. The need for this remedy in the federal field was summarized in a Senate Report as follows:

> ". . . it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity." S. Rep. No. 1005, 73d Cong., 2d Sess., pp. 2–3.

If there is a case where the need for this remedy in the shadow of a criminal prosecution is shown, it is this one, as MR. JUSTICE HARLAN demonstrates. Plaintiffs in No. 60 are two sets of husband and wife. One wife is pathetically ill, having delivered a stillborn fetus. If she becomes pregnant again, her life will be gravely jeopardized. This couple have been unable to get medical advice concerning the "best and safest" means to avoid pregnancy from their physician, plaintiff in No. 61, because if he gave it he would commit a crime. The use of contraceptive devices would also constitute a crime. And it is alleged—and admitted by the State—that the State's Attorney intends to enforce the law by prosecuting offenses under the laws.

A public clinic dispensing birth control information has indeed been closed by the State. Doctors and a nurse working in that clinic were arrested by the police and charged with advising married women on the use of contraceptives. That litigation produced *State* v. *Nelson*, 126 Conn. 412, 11 A. 2d 856, which upheld these statutes. That same police raid on the clinic resulted in the seizure of a quantity of the clinic's contraception literature and medical equipment and supplies. The legality of that

seizure was in question in *State* v. *Certain Contraceptive Materials*, 126 Conn. 428, 11 A. 2d 863.

The Court refers to the *Nelson* prosecution as a "test case" and implies that it had little impact. Yet its impact was described differently by a contemporary observer who concluded his comment with this sentence: "This serious setback to the birth control movement [the *Nelson* case] led to the closing of all the clinics in the state, just as they had been previously closed in the state of Massachusetts." [1] At oral argument, counsel for appellants confirmed that the clinics are still closed. In response to a question from the bench he affirmed that "no public or private clinic" has dared give birth control advice since the decision in the *Nelson* case.[2]

These, then, are the circumstances in which the Court feels that it can, contrary to every principle of American or English common law,[3] go outside the record to conclude that there exists a "tacit agreement" that these statutes will not be enforced. No lawyer, I think, would advise his clients to rely on that "tacit agreement." No police official, I think, would feel himself bound by that

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[1] Himes, A Decade of Progress in Birth Control, 212 Ann. Am. Soc. of Pol. & Soc. Sci. 88, 94 (1940).

[2] It may be, as some suggest, that these bizarre laws are kept on the books solely to insure that traffic in contraceptives will be furtive, or will be limited to those who, by the accident of their education, travels, or wealth, need not rely on local public clinics for instruction and supply. Yet these laws—as the decision below shows—are not limited to such situations.

[3] "On the continent there was some speculation during the middle ages as to whether a law could become inoperative through long-continued desuetude. In England, however, the idea of prescription and the acquisition or loss of rights merely by the lapse of a particular length of time found little favour. . . . There was consequently no room for any theory that statutes might become obsolete." Plucknett, A Concise History of the Common Law (1956), pp. 337–338.

"tacit agreement." After our national experience during the prohibition era, it would be absurd to pretend that all criminal statutes are adequately enforced. But that does not mean that bootlegging was the less a crime. Cf. *Costello* v. *United States*, 365 U. S. 265. In fact, an arbitrary administrative pattern of non-enforcement may increase the hardships of those subject to the law. See J. Goldstein, Police Discretion Not to Invoke the Criminal Process, 69 Yale L. J. 543.

When the Court goes outside the record to determine that Connecticut has adopted "an undeviating policy of nullification . . . of its anti-contraceptive laws," it selects a particularly poor case in which to exercise such a novel power. This is not a law which is a dead-letter. Twice since 1940, Connecticut has re-enacted these laws as part of general statutory revisions. Consistently, bills to remove the statutes from the books have been rejected by the legislature. In short, the statutes—far from being the accidental left-overs of another era are the center of a continuing controversy in the State. See, *e. g.*, The New Republic, May 19, 1947, p. 8.

Again, the Court relies on the inability of counsel to show any attempts, other than the *Nelson* case, "to enforce the prohibition of distribution or use of contraceptive devices by criminal processes." Yet, on oral argument, counsel for the appellee stated on his own knowledge that several proprietors had been prosecuted in the "minor police courts of Connecticut" after they had been "picked up" for selling contraceptives. The enforcement of criminal laws in minor courts have just as much impact as in those cases where appellate courts are resorted to. The need of the protection of constitutional guarantees, and the right to them, are not less because the matter is small or the court lowly. See *Thompson* v. *City of Louisville*, 363 U. S. 199; *Tumey* v. *Ohio*, 273 U. S. 510. Nor is the need lacking because the dispensing of birth-

control information is by a single doctor rather than by birth-control clinics. The nature of the controversy would not be changed one iota had a dozen doctors, representing a dozen birth-control clinics, sued for remedial relief.

What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. It is not the choice worthy of a civilized society. A sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete, orderly answer to the critical problem confronting them. We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined. See *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88. They are entitled to an answer to their predicament here and now.

II.

The right of the doctor to advise his patients according to his best lights seems so obviously within First Amendment rights as to need no extended discussion. The leading cases on freedom of expression are generally framed with reference to public debate and discourse. But as Chafee said, "the First Amendment and other parts of the law erect a fence inside which men can talk. The law-makers, legislators and officials stay on the outside of that fence. But what the men inside the fence say when they are let alone is no concern of the law." The Blessings of Liberty (1956), p. 108.

The teacher (*Sweezy* v. *New Hampshire*, 354 U. S. 234) as well as the public speaker (*Thomas* v. *Collins*, 323 U. S. 516) are included. The actor on stage or screen, the artist whose creation is in oil or clay or marble, the poet

whose reading public may be practically nonexistent, the musician and his musical scores, the counselor whether priest, parent or teacher no matter how small his audience—these too are beneficiaries of freedom of expression. The remark by President James A. Garfield that his ideal of a college was a log in the woods with a student at one end and Mark Hopkins at another (9 Dict. Am. Biog., p. 216) puts the present problem in proper First Amendment dimensions. Of course a physician can talk freely and fully with his patient without threat of retaliation by the State. The contrary thought—the one endorsed *sub silentio* by the courts below—has the cast of regimentation about it, a cast at war with the philosophy and presuppositions of this free society.

We should say with Kant that "It is absurd to expect to be enlightened by Reason, and at the same time to prescribe to her what side of the question she must adopt." [4] Leveling the discourse of medical men to the morality of a particular community is a deadening influence. Mill spoke of the pressures of intolerant groups that produce "either mere conformers to commonplace or time-servers for truth." [5] We witness in this case a sealing of the lips of a doctor because he desires to observe the law, obnoxious as the law may be. The State has no power to put any sanctions of any kind on him for any views or beliefs that he has or for any advice he renders. These are his professional domains into which the State may not intrude. The chronicles are filled with sad attempts of government to stomp out ideas, to ban thoughts because they are heretical or obnoxious. As Mill stated, "Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion." [6] When that

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[4] The Critique of Pure Reason, 42 Great Books, p. 221.

[5] On Liberty of Thought and Discussion, 43 Great Books, p. 282.

[6] *Ibid.*

happens society suffers. Freedom working underground, freedom bootlegged around the law is freedom crippled. A society that tells its doctors under pain of criminal penalty what they may not tell their patients is not a free society. Only free exchange of views and information is consistent with "a civilization of the dialogue," to borrow a phrase from Dr. Robert M. Hutchins. See *Wieman* v. *Updegraff*, 344 U. S. 183, 197 (concurring opinion).

III.

I am also clear that this Connecticut law as applied to this married couple deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment.

The first eight Amendments to the Constitution have been made applicable to the States only in part. My view has been that when the Fourteenth Amendment was adopted, its Due Process Clause incorporated all of those Amendments. See *Adamson* v. *California*, 332 U. S. 46, 68 (dissenting opinion). Although the history of the Fourteenth Amendment may not be conclusive, the words "due process" acquired specific meaning from Anglo-American experience.[7] As MR. JUSTICE BRENNAN recently stated, "The Bill of Rights is the primary source of expressed information as to what is meant by constitutional liberty. The safeguards enshrined in it are deeply etched in the foundations of American's freedoms." The Bill of Rights and the States (1961), pp. 19–20. When the Framers wrote the Bill of Rights they en-

[7] See Konvitz, Fundamental Liberties of a Free People (1957), pp. 37–39; Green, The Bill of Rights, the Fourteenth Amendment and the Supreme Court, 46 Mich. L. Rev. 869, 904 *et seq.* (1948); Holmes, The Fourteenth Amendment and the Bill of Rights, 7 S. C. L. Rev. 596 (1955).

And see Mr. Justice Rutledge (concurring) in *In re Oliver*, 333 U. S. 257, 280–281.

shrined in the form of constitutional guarantees those rights—in part substantive, in part procedural—which experience indicated were indispensable to a free society. Some would disagree as to their importance; the debate concerning them did indeed start before their adoption and has continued to this day. Yet the constitutional conception of "due process" must in my view include them all until and unless there are amendments that remove them. That has indeed been the view of a full court of nine Justices, though the members who make up that court unfortunately did not sit at the same time.[8]

Though I believe that "due process" as used in the Fourteenth Amendment includes all of the first eight Amendments, I do not think it is restricted and confined to them. We recently held that the undefined "liberty" in the Due Process Clause of the Fifth Amendment includes freedom to travel. *Kent* v. *Dulles*, 357 U. S. 116, 125–127. Cf. *Edwards* v. *California*, 314 U. S. 160, 177, 178 (concurring opinion). The right "to marry, establish a home and bring up children" was said in *Meyer* v. *Nebraska*, 262 U. S. 390, 399, to come within the "liberty" of the person protected by the Due Process Clause of the Fourteenth Amendment. As I indicated in my dissent in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 467, "liberty" within the purview of the Fifth Amendment includes the right of "privacy," a right I thought infringed in that case because a member of a "captive audience" was forced to listen to a government-sponsored radio program. "Liberty" is a conception that

[8] I start with Justices Bradley, Swayne, Field, Clifford and Harlan. To this number, Mr. Justice Brewer can probably be joined on the basis of his agreement "in the main" with Mr. Justice Harlan in *O'Neill* v. *Vermont*, 144 U. S. 323, 371. See the Appendix to Mr. Justice Black's dissent in *Adamson* v. *California*, *supra*, 120–123. To these I add Mr. Justice Black, Mr. Justice Murphy, Mr. Justice Rutledge and myself (*Adamson* v. *California*, *supra*, 68, 123).

sometimes gains content from the emanations of other specific guarantees (*N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 460) or from experience with the requirements of a free society.

For years the Court struck down social legislation when a particular law did not fit the notions of a majority of Justices as to legislation appropriate for a free enterprise system. Mr. Justice Holmes, dissenting, rightly said that "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Lochner* v. *New York*, 198 U. S. 45, 75–76.

The error of the old Court, as I see it, was not in entertaining inquiries concerning the constitutionality of social legislation but in applying the standards that it did. See *Tot* v. *United States*, 319 U. S. 463; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490. Social legislation dealing with business and economic matters touches no particularized prohibition of the Constitution, unless it be the provision of the Fifth Amendment that private property should not be taken for public use without just compensation. If it is free of the latter guarantee, it has a wide scope for application. Some go so far as to suggest that whatever the majority in the legislature says goes (cf. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 64), that there is no other standard of constitutionality. That reduces the legislative power to sheer voting strength and the judicial function to a matter of statistics. As Robert M. Hutchins has said, "It is obviously impossible to raise questions of freedom and justice if the sole

duty of the court is to decide whether the case at bar falls within the scope of the duly issued command of a duly constituted sovereign." Two Faces of Federalism (1960), p. 18. While the legislative judgment on economic and business matters is "well-nigh conclusive" (*Berman* v. *Parker*, 348 U. S. 26, 32), it is not beyond judicial inquiry.

The regime of a free society needs room for vast experimentation. Crises, emergencies, experience at the individual and community levels produce new insights; problems emerge in new dimensions; needs, once never imagined, appear. To stop experimentation and the testing of new decrees and controls, is to deprive society of a needed versatility. Yet to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the Court.[9]

The present legislation is an excellent example. If a State banned completely the sale of contraceptives in drug stores, the case would be quite different. It might seem to some or to all judges an unreasonable restriction.

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[9] "The due process clause is said to exact from the states all that is 'implicit in the concept of ordered liberty.' It is further said that the concept is a living one, that it guarantees basic rights, not because they have become petrified as of any one time, but because due process follows the advancing standards of a free society as to what is deemed reasonable and right. It is to be applied, according to this view, to facts and circumstances as they arise, the cases falling on one side of the line or the other as a majority of nine justices appraise conduct as either implicit in the concept of ordered liberty or as lying without the confines of that vague concept. Of course, in this view, the due process clause of the Fifth Amendment, which confessedly must be construed like that of the Fourteenth, may be repetitious of many of the other guaranties of the first eight amendments and may render many of their provisions superfluous." Roberts, The Court and the Constitution (1951), p. 80.

Yet it might not be irrational to conclude that a better way of dispensing those articles is through physicians. The same might be said of a state law banning the manufacture of contraceptives. Health, religious, and moral arguments might be marshalled *pro* and *con*. Yet it is not for judges to weigh the evidence. Where either the sale or the manufacture are put under regulation, the strictures are on business and commercial dealings that have had a long history with the police power of the States.

The present law, however, deals not with sale, not with manufacture but with *use*. It provides:

> "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." Conn. Gen. Stat., 1958, § 53–32.

The regulation as applied in this case touches the relationship between man and wife. It reaches into the intimacies of the marriage relationship. If we imagine a regime of full enforcement of the law in the manner of an Anthony Comstock,[10] we would reach the point where

[10] Anthony Comstock (1844–1915)—the Congregationalist who inspired the foundation of the New York Society for the Suppression of Vice in 1873 and the Watch and Ward Society of Boston in 1876 and who inspired George Bernard Shaw to use the approbious word "comstockery" in Mrs. Warren's Profession—was responsible for the passage in 1879 of this Connecticut law.

"Anthony Comstock had moral earnestness and it can't be faked. His concern was with Puritan theology rather than Puritan ethics. Righteousness seemed to him less important than salvation and consequently tricks which seemed shabby to neutrals left him without shame. A man who fights for the safety of his immortal soul can hardly be expected to live up to the best Queensberry traditions in the clinches. To grant the major premises of Comstock's religious and social philosophy is to acquit him of any lack of logic. Obscenity

search warrants issued and officers appeared in bedrooms to find out what went on.[11] It is said that this is not that case. And so it is not. But when the State makes "use" a crime and applies the criminal sanction to man and wife, the State has entered the innermost sanctum of the home. If it can make this law, it can enforce it. And proof of its violation necessarily involves an inquiry into the relations between man and wife.

That is an invasion of the privacy that is implicit in a free society. A noted theologian who conceives of the use of a contraceptive as a "sin" nonetheless admits that a "use" statute such as this enters a forbidden domain.

> ". . . the Connecticut statute confuses the moral and legal, in that it transposes without further ado a private sin into a public crime. The criminal act here is the private use of contraceptives. The real

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was to Anthony poison to soul and body, and anything remotely touching upon sex was to his mind obscene. He seems to have believed implicitly in medical theories which have since his time been discarded. Even in his day beliefs were changing, but Comstock was loyal to the old-line ideas. It was his notion that idiocy, epilepsy and locomotor-ataxia were among the ailments for which autoeroticism was responsible. Since death and damnation might be, according to his belief, the portion of the girl or boy who read a ribald story, it is easy to understand why he was so impatient with those who advanced the claims of art. Even those who love beauty would hardly be prepared to burn in hell forever in its service. Comstock's decision was even easier, for he did not know, understand or care anything about beauty." Broun and Leech, Anthony Comstock (1927), pp. 265–266.

[11] Those warrants would, I think, go beyond anything so far known in our law. The law has long known the writ *de ventre inspiciendo* authorising matrons to inspect the body of a woman to determine if she is pregnant. This writ was issued to determine before a hanging whether a convicted female was pregnant or to ascertain whether rightful succession of property was to be defeated by assertion of a suppositious heir. See 1 Blackstone Commentaries (Jones ed. 1915), p. 651.

area where the coercions of law might, and ought to, be applied, at least to control an evil—namely, the contraceptive industry—is quite overlooked. As it stands, the statute is, of course, unenforceable without police invasion of the bedroom, and is therefore indefensible as a piece of legal draughtmanship." Murray, We Hold These Truths (1960), pp. 157–158.

This notion of privacy is not drawn from the blue.[12] It emanates from the totality of the constitutional scheme under which we live.[13]

"One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. The State then is not one vital institution among others: a policeman, a referee, and a source of initiative for the common good. Instead, it seeks to be coextensive with family and school, press, business community, and the Church, so that all of these component interest groups are, in principal, reduced to organs and agencies of the State. In a democratic

[12] The right "to be let alone" had many common-law overtones. See Cooley, Torts (2d ed. 1888), p. 29; Warren and Brandeis, Right To Privacy, 4 Harv. L. Rev. 192. Cf. Ohio Rev. Code, § 2905.34, which makes criminal knowing "possession" of "a drug, medicine, article or thing intended for the prevention of conception," doctors and druggists being excepted. § 2905.37.

[13] Mr. Justice Murphy dissenting in *Adamson* v. *California*, 332 U. S. 46, 124, said:

"I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment. But I am not prepared to say that the latter is entirely and necessarily limited by the Bill of Rights. Occasions may arise where a proceeding falls so far short of conforming to fundamental standards of procedure as to warrant constitutional condemnation in terms of a lack of due process despite the absence of a specific provision in the Bill of Rights."

political order, this megatherian concept is expressly rejected as out of accord with the democratic understanding of social good, and with the actual make-up of the human community." [14]

Can there be any doubt that a Bill of Rights that in time of peace bars soldiers from being quartered in a home "without the consent of the owner" [15] should also bar the police from investigating the intimacies of the marriage relation? The idea of allowing the State that leeway is congenial only to a totalitarian regime.

I dissent from a dismissal of these cases and our refusal to strike down this law.

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[14] Calhoun, Democracy and Natural Law, 5 Nat. Law Forum, 31, 36 (1960).

[15] The Third Amendment provides:

"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

SUPREME COURT OF THE UNITED STATES

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[June 19, 1961.]

MR. JUSTICE HARLAN, dissenting.

I am compelled, with all respect, to dissent from the dismissal of these appeals. In my view the course which the Court has taken does violence to established concepts of "justiciability," and unjustifiably leaves these appellants under the threat of unconstitutional prosecution. Regrettably, an adequate exposition of my views calls for a dissenting opinion of unusual length.

Between them these suits seek declaratory relief against the threatened enforcement of Connecticut's antibirth control laws making criminal the use of contraceptives, insofar as such laws relate to the use of contraceptives by married persons and the giving of advice to married persons in their use.[1] The appellants, a married couple,

[1] These statutes, Conn. Gen. Stat. Rev., 1958, § 53–31 (forbidding the use of contraceptives), and Conn. Gen. Stat. Rev., 1958, § 54–196

a married woman, and a doctor ask that it be adjudged, contrary to what the Connecticut courts have held, that such laws, as threatened to be applied to them in circumstances described in the opinion announcing the judgment of the Court (*ante*, pp. —, —), violate the Fourteenth Amendment, in that they deprive appellants of life, liberty, or property without due process.

The plurality opinion of the Court gives, as the basis for dismissing the appeals, the reason that, as to the two married appellants, the lack of demonstrated enforcement of the Connecticut statute bespeaks an absence of exigent adversity which is posited as the condition for evoking adjudication from us, and, as to the doctor, that his compliance with the State statute is uncoerced by any "realistic fear of prosecution," giving due recognition to "his standing as a physician . . . and his personal sensitiveness." With these reasons it appears that the concurring opinion agrees.

In *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 462, it was said that "declaratory judgment procedure may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered." In my view of these cases a present determination of the Constitutional issues is the only course which will advance justice, and I can find no sound reason born of considerations as to the possible inadequacy or ineffectiveness of the judgment that might be rendered which justifies the Court's contrary disposition. While ordinarily I would not deem it appropriate to deal, in dissent, with Constitutional issues which the Court has not reached, I shall do so here because such issues, as I see things, are entangled with the Court's conclusion as to the nonjusticiability of these appeals.

(the general accessory law), are set forth in Note 2 of the plurality opinion, *ante*, p. —.

PART ONE.

Justiciability.

There can be no quarrel with the plurality opinion's statement that "justiciability is not a legal concept with a fixed content or susceptible of scientific verification," but, with deference, the fact that justiciability is not precisely definable does not make it ineffable. Although a large number of cases are brought to bear on the conclusion that is reached, I think it is fairly demonstrable that the authorities fall far short of compelling dismissal of these appeals.[2] Even so, it is suggested that the cases do point the way to a "rigorous insistence on exigent adversity" and a "policy against premature constitutional decision," which properly understood does indeed demand that result.

The policy referred to is one to which I unreservedly subscribe. Without undertaking to be definitive, I would suppose it is a policy the wisdom of which is woven of several strands: (1) Due regard for the fact that the source of the Court's power lies ultimately in its duty

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[2] Only two cases are squarely relied on, *C. I. O.* v. *McAdory*, 325 U. S. 472, a companion case to *Alabama State Federation of Labor* v. *McAdory*, *supra*, discussed at pp. —, —; *infra*, and tendering the same issues; and *Ex parte La Prade*, 289 U. S. 444. The appeal in the principal *McAdory* case was dismissed because the state statute there challenged had not yet been construed by the state courts, and it was thought that state construction might remove some Constitutional doubts. In the companion *McAdory* case, the appeal was likewise dismissed, the State having "agreed not to enforce § 7 of the Act [there challenged] until the final decision as to the section's validity by this Court in *Alabama State Federation of Labor* v. *McAdory* . . . ." *Id.*, at 475. In the present appeals there is no agreement not to prosecute, no companion case awaiting disposition, and no uncertainty about state law due to lack of state construction.

As to *Ex parte La Prade*, *supra*, see note 11, *infra*.

to decide, in conformity with the Constitution, the particular controversies which come to it, and does not arise from some generalized power of supervision over state and national legislatures; (2) therefore it should insist that litigants bring to the Court interests and rights which require present recognition and controversies demanding immediate resolution; (3) also it follows that the controversy must be one which is in truth and fact the litigant's own, so that the clash of adversary contest which is needed to sharpen and illuminate issues is present and gives that aid on which our adjudicatory system has come to rely; (4) finally, it is required that other means of redress for the particular right claimed be unavailable, so that the process of the Court may not become overburdened and conflicts with other courts or departments of government may not needlessly be created, which might come about if either those truly affected are not the ones demanding relief, or if the relief we can give is not truly needed.

In particularization of this composite policy the Court, in the course of its decisions on matters of justiciability, has developed and given expression to a number of important limitations on the exercises of its jurisdiction, the presence or absence of which here should determine the justiciability of these appeals. Since all of them are referred to here in one way or another, it is well to proceed to a disclosure of those which are *not* involved in the present appeals, thereby focusing attention on the one factor on which reliance appears to be placed by both the plurality and concurring opinions in this instance.

First: It should by now be abundantly clear that the fact that only Constitutional claims are presented in proceedings seeking *anticipatory* relief against state criminal statutes does not for that reason alone make the claims premature. See, *e. g.*, *Terrace* v. *Thompson*, 263 U. S. 197; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Euclid* v.

Ambler Co., 272 U. S. 365. Whatever general pronouncements may be found to the contrary, must, in context, be seen to refer to considerations quite different from anything present in these cases.

Thus in *Alabama State Federation of Labor* v. *McAdory*, *supra*, anticipatory relief was withheld for the precise reason that normally this Court ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts. To the same effect see *Parker* v. *Los Angeles*, 338 U. S. 327; *Watson* v. *Buck*, 313 U. S. 387; *Beal* v. *Missouri Pacific R. Co.*, 312 U. S. 45. Indeed, without belaboring the point, the principle that anticipatory relief against state criminal statutes is not unavailable as a general matter may best be illustrated by several cases recently decided in this Court. In *Harrison* v. *N. A. A. C. P.*, 360 U. S. 167, the premise of our action was that anticipatory relief should be obtained, if possible—with review here on certiorari or appeal—in a state court which could then authoritatively construe a new and ambiguous state statute; only if such relief were unavailable, should a Federal District Court exercise its statutory jurisdiction. And in our recent decisions upholding the constitutionality of state Sunday-closing laws,— U. S. —, *et seq.*, not one of the opinions paused even slightly over the appropriateness of anticipatory relief, although in one case that issue was argued, *Gallagher* v. *Crown Kosher Super Market*, — U. S. —.

Hence, any language in the cases where the Court has abstained from exercising its jurisdiction, to the effect that we should not "entertain Constitutional questions in advance of the strictest necessity," *Parker* v. *Los Angeles County*, *supra*, at 333, is not at all apposite, in the present cases. For these appeals come to us from the highest court of Connecticut, thus affording us—in company with previous State interpretations of the same statute—with

a clear construction of the scope of the statute, thereby in effect assuring that our review constitutes no greater interference with state administration than the state procedures themselves allow.

Second: I do not think these appeals may be dismissed for want of "ripeness" as that concept has been understood in its "varied application."[3] There is no lack of "ripeness" in the sense that is exemplified by cases such as *Stearns* v. *Wood*, 236 U. S. 75; *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419; *United Public Workers* v. *Mitchell*, 330 U. S. 75; *International Longshoremen's Union* v. *Boyd*, 347 U. S. 222; and perhaps again *Parker* v. *Los Angeles*, *supra*. In all of those cases the lack of ripeness inhered in the fact that the need for some further procedure, some further contingency of application or interpretation, whether judicial, administrative or executive, or some further clarification of the intentions of the claimant, served to make remote the issue which was sought to be presented to the Court. Certainly the appellants have stated in their pleadings fully and unequivocally what it is that they intend to do; no clarifying or resolving contingency stands in their way before they may embark on that conduct. Thus there is no circumstance besides that of detection or prosecution to make remote the particular controversy.

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[3] Manifestly the type of ripeness found wanting in cases such as *Massachusetts* v. *Mellon*, 262 U. S. 447, *Texas* v. *Interstate Commerce Comm'n*, 258 U. S. 159, *New Jersey* v. *Sargeant*, 269 U. S. 328, and *Arizona* v. *California*, 283 U. S. 423, is not lacking in the cases before us. For the recurrent theme of those cases, all of which challenge federal action as an encroachment on state sovereignty, is the fact that the mere existence of state sovereign powers and prerogatives which may bear generally upon individual rights raises no such concrete and practical issues as courts are accustomed to consider, so that adjudication upon their validity in such circumstances would take place in the most abstract kind of setting.

And it is clear beyond cavil that the mere fact that a controversy such as this is rendered still more unavoidable by an actual prosecution, is not *alone* sufficient to make the case too remote, not ideally enough "ripe" for adjudication, at the prior stage of anticipatory relief.

Moreover, it follows from what has already been said that there is no such want of ripeness as was presented in *Rescue Army* v. *Municipal Court*, 331 U. S. 549, or in our recent decisions dismissing the appeals in *Atlanta Newspapers* v. *Grimes*, 364 U. S. 290, and *United States* v. *Fruehauf*, 365 U. S. 146, where the records presented for adjudication a controversy so artificially truncated as to make the cases not susceptible to intelligent decision. I cannot see what further elaboration is required to enable us to decide the appellants' claims, and indeed neither the plurality opinion nor the concurring opinion—notwithstanding the latter's characterization of this record as "skimpy"—suggests what more grist is needed before the judicial mill could turn.

Third: This is not a feigned, hypothetical, friendly or collorable suit such as discloses "a want of truly adversary contest." Clearly these cases are not analogous to *Wood-Paper Co.* v. *Heft*, 8 Wall. 333, or *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.*, 145 U. S. 300, where prior to consideration the controversy in effect became moot by the merger of the two contesting interests. Nor is there any question of collusion as in *Lord* v. *Veazie*, 8 How. 251 or in *United States* v. *Johnson*, 319 U. S. 302. And there is nothing to suggest that the parties by their conduct of this litigation have cooperated to force an adjudication of a Constitutional issue which—were the parties interested solely in winning their cases rather than obtaining a Constitutional decision—might not arise in an arms length contested proceeding. Such was the situation in *Chicago & Grand Trunk R. Co.* v. *Wellman*, 143 U. S. 339, where the parties sought a ruling

as to whether a particular passenger rate was unconstitutionally confiscatory, having stipulated all the debatable and contingent facts which otherwise might have rendered a Constitutional decision unnecessary.

In the present appeals no more is alleged or conceded than is consistent with undisputed facts and with ordinary practice in deciding a case for anticipatory relief on demurrer. I think it is unjustifiably stretching things to assume that appellants are not deterred by the threat of prosecution from engaging in the conduct in which they assert a right to engage, or to assume that appellee's demurrer to the proposition that he asserts the right to enforce the statute against appellants at any time he chooses is anything but a candid one.

Indeed, as will be developed below, I think both the plurality and concurring opinions confuse on this score the predictive likelihood that, had they not brought themselves to appellee's attention, he would not enforce the statute against them, with some entirely suppositious "tacit agreement" not to prosecute, thereby ignoring the prosecutor's claim, asserted in these very proceedings, of a right, at his unbounded prosecutorial discretion, to enforce the statute.

Fourth: The doctrine of the cases dealing with a litigant's lack of standing to raise a Constitutional claim is said to justify the dismissal of these appeals. The precedents put forward as examples of this doctrine, see the plurality opinion, note 5, as well as cases such as *Frothingham* v. *Mellon* and *Massachusetts* v. *Mellon*, 262 U. S. 447, and *Texas* v. *Interstate Commerce Comm'n*, 258 U. S. 158, do indeed stand for the proposition that a legal claim will not be considered at the instance of one who has no real and concrete interest in its vindication. This is well in accord with the grounds for declining jurisdiction suggested above, pp. ——, ——. But this doctrine in turn needs further particularization lest it become a catch-all

for an unarticulated discretion on the part of this Court to decline to adjudicate appeals involving Constitutional issues.

There is no question but that appellants here are asserting rights which are peculiarly their own, and which, if they are to be raised at all, may be raised most appropriately by them. Cf. *Tileston* v. *Ullman*, 318 U. S. 44; *Texas* v. *Interstate Commerce Comm'n*, *supra*; *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341 (concurring opinion). Nor do I understand the argument to be that this is the sort of claim which is too remote ever to be pressed by anyone, because no one is ever sufficiently involved. Cf. *Massachusetts* v. *Mellon*, *Frothingham* v. *Mellon*, *supra*. Thus, in truth, it is not the parties pressing this claim but the occasion chosen for pressing it which is objected to. But as has been shown the fact that it is anticipatory relief which is asked cannot of itself make the occasion objectionable.

We are brought, then, to the precise failing in these proceedings which is said to justify refusal to exercise our mandatory appellate jurisdiction: that there has been but one recorded Connecticut case dealing with a *prosecution* under the statute.[4] The significance of this lack of recorded evidence of prosecutions is said to make the presentation of appellants' rights too remote, too contingent, too hypothetical for adjudication in the light of the policies already considered. See pp. —, *supra*. In my view it is only as a result of misconceptions both about the purport of the record before us and about the

[4] Some support is sought to be drawn for the supposition of state acquiescence in violation of the statute from the case of *State* v. *Certain Contraceptive Materials*, 126 Conn. 428. But that case held no more than that contraceptive materials could not be seized under the authority of a statute interpreted to deal with the seizure of gambling paraphernalia.

nature of the rights appellants put forward that this conclusion can be reached.

As far as the record is concerned, I think it is pure conjecture, and indeed conjecture which to me seems contrary to realities, that an open violation of the statute by a doctor (or more obviously still by a birth control clinic) would not result in a substantial threat of prosecution. Crucial to the opposite conclusion is the description of the 1940 prosecution instituted in *State* v. *Nelson*, 126 Conn. 412, as a "test case" which, as it is viewed, scarcely even punctuates the uniform State practice of nonenforcement of this statute. I read the history of Connecticut enforcement in a very different light. The *Nelson* case, as appears from the state court's opinion, was a prosecution of two doctors and a nurse for aiding and abetting violations of this statute by married women in prescribing and advising in the use of contraceptive materials by them. It is true that there is evidence of a customary unwillingness to enforce the statute prior to *Nelson*, for in that case the prosecutor stated to the trial court in a later motion to discontinue the prosecutions that "when this Waterbury clinic [operated by the defendants] was opened there were in operation elsewhere in the State at least eight other contraceptive clinics which had been in existence for a long period of time and no question as to their right to operate had been raised. . . ." [5]

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[5] The "circumstances" of the *Nelson* case may best be gathered from the remarks of the State's prosecuting attorney, Mr. Fitzgerald, seeking the approval of the trial judge for a *nolle prosequi* in that case after the decision of the State Supreme Court. In an affidavit accompanying a transcript of the proceedings on the State's motion, the attorney for the defendants stated that "said criminal prosecutions were prosecutions instituted by the State upon complaint of a citizen and were instituted in no sense with the prior knowledge or

What must also be noted is that the prosecutor followed this statement with an explanation that the primary purpose of the prosecution was to provide clear warning to all those who, like Nelson, might rely on this practice of nonenforcement. He stated that the purpose of the prosecution was:

> "the establishment of the constitutional validity and efficacy of the statutes under which these accused are informed against. Henceforth any person, whether a physician or layman, who violates the provisions of these statutes, must expect to be prosecuted and punished in accordance with the literal provisions of the law."*

Thus the respect in which *Nelson* was a test case is only that it was brought for the purpose of making entirely clear the State's power and willingness to enforce against "*any* person, whether physician or layman" (emphasis supplied), the statute and to eliminate from future cases the very doubt about the existence of these elements which had resulted in eight open birth control clinics, and which would have made unfair the conviction of Nelson.

The plurality opinion now finds, and the concurring opinion must assume, that the only explanation of the absence of recorded prosecutions subsequent to the *Nelson* case is that Connecticut has renounced that intention to prosecute and punish "*any* person . . . in accordance with the literal provisions of the law" which it announced in *Nelson*. But if renunciation of the purposes of the

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approval of the accused, and there was no pre-trial acquiescence by the accused that said actions would be instituted to test the constitutionality of the statutes in question."

* This statement was made in the same proceedings referred to in note 5, *supra*.

Nelson prosecution is consistent with a lack of subsequent prosecutions, success of that purpose is no less consistent with this lack. I find it difficult to believe that doctors generally—and not just those operating specialized clinics—would continue openly to disseminate advice about contraceptives after *Nelson* in reliance on the State's supposed unwillingness to prosecute, or to consider that high-minded members of the profession would in consequence of such inaction deem themselves warranted in disrespecting this law so long as it is on the books. Nor can I regard as "chimerical" the fear of enforcement of these provisions that seems to have caused the disappearance of at least nine birth control clinics.[7] In short, I fear that the Court has indulged in a bit of sleight-of-hand to be rid of this case. It has treated the significance of the absence of prosecutions during the twenty years since *Nelson* as identical with that of the absence of prosecutions during the years before *Nelson*. It has ignored the fact that the very purpose of the *Nelson* prosecution was to change defiance into compliance. It has ignored the very possibility that this purpose may have been successful.[8] The result is to postu-

[7] See Brief of Planned Parenthood Federation of America, Inc., as *amicus curiae*, p. 4, and Appendix f.

[8] The concurring opinion concludes, apparently on the basis of the *Nelson* episode, that the "true controversy in this case is over the opening of birth-control clinics on a large scale . . . ." It should be said at once that as to *these* appeals this is an entirely unwarranted assumption. The *amicus curiae* in this case, the Planned Parenthood Federation of America, Inc., is indeed interested in such clinics, see note 7, *supra*, but as to the actual parties here, there is not one word in the record or their briefs to suggest that their interest is anything other than they say it is. The *Nelson* prosecution, it is true, involved a doctor and nurses at a birth-control clinic, but there is nothing about these statutes as they have been authoritatively construed in this and previous cases, that limits their application to advice given by a doctor

late a security from prosecution for open defiance of the statute which I do not believe the record supports.[9]

These considerations alone serve to bring appellants so squarely within the rule of *Pierce* v. *Society of Sisters*, 268 U. S. 510, and *Truax* v. *Raich*, 239 U. S. 33, that further demonstration would be pointless.

But even if Dr. Buxton were not in the litigation and appellants Poe and Doe were seeking simply to use con-

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in a clinic of that sort, as opposed to advice given by a doctor in some less specialized clinic, a hospital or in his own office.

The only conceivable sense in which "the true controversy in this case is over the opening of birth-control clinics" must lie in the circumstance that since the notorious and avowed purpose of such a clinic is the violation of these statutes, there would not be the same problem of detection or proof of violations as might otherwise present itself. The relevance in turn of this circumstance must be that, in the view of the concurring opinion there is a present threat of enforcement against any such clinic—which I too belive—but coupled with a further assumption—one shared by the plurality opinion though lacking any factual warrant whatever—that these statutes do not also deter members of the medical profession in general from violating these statutes. Furthermore both opinions must share the assumption that the appellants may be required to hold what may be their constitutional rights at the whim and pleasure of the prosecutor. In sum, the strong implication of the concurring opinion that a suit for anticipatory relief brought by a birth-control clinic (though it would raise no different issues and present a record no less "skimpy") would succeed in invoking our jurisdiction where these suits fail, exposes the fallacy underlying the Court's disposition: the unprecedented doctrine that a suit for anticipatory relief will be entertained at the instance of one who is forced to violate a statue flagrantly, but not at the urging of one who may violate it surreptitiously with a high probability of avoiding detection.

[9] In this regard it is worth comparing the record of the Federal Communications Commission in enforcing its regulations by means of a threat of revocation of station licenses. The Commission has not, as is generally known, used this sanction much more readily than Connecticut has invoked criminal penalties to enforce the laws here in question, but no one would discount entirely the efficacy of the threat or suggest that open defiance of Commission regulations is without substantial risks.

traceptives without any need of consulting a physician beforehand—which is not the case we have, although it is the case which the plurality opinion of the Court is primarily concerned to discuss—even then I think that it misconceives the concept of justiciability and the nature of these appellants' rights to say that the failure of the State to carry through any criminal prosecution requires dismissal of their appeals.

The Court's disposition assumes that to decide the case now, in the absence of any consummated prosecutions, is unwise because it forces a difficult decision in advance of any exigent necessity therefor. Of course it is abundantly clear that this requisite necessity can exist prior to any actual prosecution, for that is the theory of anticipatory relief, and is by now familiar law. What must be relied on, therefore, is that the historical absence of prosecutions in some way leaves these appellants free to violate the statute without fear of prosecution, whether or not the law is Constitutional, and thus absolves us from the duty of deciding if it is. Despite the suggestion of a "tougher and truer law" of immunity from criminal prosecution and despite speculation as to a "tacit agreement" that this law will not be enforced, there is, of course, no suggestion of an estoppel against the State if it should attempt to prosecute appellants. Neither the plurality nor the concurring opinion suggests that appellants have some legally cognizable right not to be prosecuted if the statute is Constitutional. What is meant is simply that the appellants are more or less free to act without fear of prosecution because the prosecuting authorities of the State, in their discretion and at their whim, are, as a matter of prediction, unlikely to decide to prosecute.

Here is the core of my disagreement with the present disposition. As I will develop later in this opinion, the most substantial claim which these married persons press

is their right to enjoy the privacy of their marital relations free of the enquiry of the criminal law, whether it be in a prosecution of them or of a doctor whom they have consulted. And I cannot agree that their enjoyment of this privacy is not substantially impinged upon, when they are told that if they use contraceptives, indeed whether they do so or not, the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of the prosecutor.[10] Connecticut's highest court has told us in the clearest terms that, given proof, the prosecutor will succeed if he decides to bring a proceeding against one of the appellants for taking the precise actions appellants have announced they intend to take. The State Court does not agree that there has come into play "a tougher and truer law than the dead words of the written text," and in the light of twelve unsuccessful attempts since 1943 to change this legislation, *Poe v. Ullman*, 147 Conn. 48, 56, n. 2, this position is not difficult to understand. Prosecution and conviction for the clearly spelled out actions the appellants wish to take is not made unlikely by any fortuitous factor outside the control of the parties, nor is it made uncertain by possible variations in the actions appellants actually take from those the state courts have already passed upon. All that stands between the appellants and jail is the legally unfettered whim of the prosecutor and the Constitutional issue this Court today refuses to decide.

If we revert again to the reasons underlying our reluc-

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[10] It is suggested that prosecution is unlikely because of an interspousal testimonial privilege in Connecticut. Assuming that such a privilege exists and is applicable here, the testimony of either spouse is not necessary to a conviction. Furthermore, as will be argued, the real incursion here inheres in the institution of a prosecution in this matter at all, with the consequent need of an opportunity for the parties—guilty or innocent—to defend themselves against the charges. See pp. —, —, *infra*.

tance to exercise a jurisdiction which technically we possess, and the concrete expression of those underlying reasons in our cases, see pp. ——, ——, *supra*, then I think it must become clear that there is no justification for failing to decide these married persons' appeals. The controversy awaits nothing but an actual prosecution, and, as will be shown, the substantial damage against which these appellants, the Does and the Poes, are entitled to protection will be accomplished by such a prosecution, whatever its outcome in the state courts or here. By the present decision, although as a general matter the parties would be entitled to our review in an anticipatory proceeding which the State allowed to be instituted in its courts, these appellants are made to await actual prosecution before we will hear them. Indeed it appears that whereas appellants would surely have been entitled to review were this a new statute, see *Harrison* v. *N. A. A. C. P.*, *supra*, the State here is enabled to maintain at least some substantial measure of compliance with this statute and still obviate any review in this Court, by the device of purely discretionary prosecutorial inactivity. It seems to me to destroy the whole purpose of anticipatory relief to consider the prosecutor's discretion, once all legal and administrative channels have been cleared, as in any way analogous to those other contingencies which make remote a controversy presenting Constitutional claims.

In this light it is not surprising that the Court's position is without support in the precedents.[11] Indeed it seems to

[11] There is a much discredited dictum in *Ex parte La Prade*, 289 U. S. 444, that in an injunction action there must be an allegation of threatened immediate enforcement of the statute. See 50 Yale L. J. 1278; Borchard, Challenging "Penal" Statutes by Declaratory Action, 52 Yale L. J. 445; 62 Harv. L. Rev. 870–871. But against this dictum (which even in its context was justified only as a natural consequence of the rule of *Ex parte Young*, 209 U. S. 123, involving

me that *Pierce* v. *Society of Sisters*, 268 U. S. 510, provides very clear authority contrary to the position of the Court in this case, for there a Court which included Justices Holmes, Brandeis, and Stone rejected a claim of prematureness and then passed upon and held unconstitutional a state statute whose sanctions were not even to become effective for more than seventeen months after the time the case was argued to this Court. The Court found allegations of present loss of business, caused by the threat of the statute's future enforcement against the Society's clientele, sufficient to make the injury to the Society "present and very real." 268 U. S., at 536. I cannot regard as less present, or less real, the tendency to discourage the exercise of the liberties of these appellants, caused by reluctance to submit their freedoms from prosecution and conviction to the discretion of the Connecticut prosecuting authorities. I therefore think it incumbent on us to consider the merits of appellants' Constitutional claims.

PART TWO.

Constitutionality.

I consider that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment. I believe that a statute making it a criminal offense for *married couples* to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life. I reach this conclusion, even though I find it difficult and unnecessary at this

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suits against state officers) one can array numerous cases in which proof of any such immediate threat was considered unnecessary and the Court proceeded to a determination of the merits. See, *e. g.*, *Pennsylvania* v. *West Virginia*, 262 U. S. 553; *Euclid* v. *Ambler Co.*, 272 U. S. 365; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Currin* v. *Wallace*, 306 U. S. 1.

juncture to accept appellants' other argument that the judgment of policy behind the statute, so applied, is so arbitrary and unreasonable as to render the enactment invalid for that reason alone. Since both the contentions draw their basis in no explicit language of the Constitution, and have yet to find expression in any decision of this Court, I feel it desirable at the outset to state the framework of Constitutional principles in which I think the issue must be judged.

I.

In reviewing state legislation, whether considered to be in the exercise of the State's police powers, or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are "the powers of government inherent in every sovereignty." *The License Cases*, 5 How. 504, 583. Only to the extent that the Constitution so requires may this Court interfere with the exercise of this plenary power of government. *Barron* v. *Mayor of Baltimore*, 7 Pet. 243. But precisely because it is the Constitution alone which warrants judicial interference in sovereign operations of the State, the basis of judgment as to the Constitutionality of state action must be a rational one, approaching the text which is the only commission for our power not in a literalistic way, as if we had a tax statute before us, but as the basic charter of our society, setting out in spare but meaningful terms the principles of government. *McCulloch* v. *Maryland*, 4 Wheat. 316. But as inescapable as is the rational process in Constitutional adjudication in general, nowhere is it more so than in giving meaning to the prohibitions of the Fourteenth Amendment and, where the Federal Government is involved, the Fifth Amendment, against the deprivation of life, liberty or property without due process of law.

It is but a truism to say that this provision of both Amendments is not self-explanatory. As to the Fourteenth, which is involved here, the history of the Amendment also sheds little light on the meaning of the provision. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights, 2 Stan. L. Rev. 15. It is important to note, however, that two views of the Amendment have not been accepted by this Court as delineating its scope. One view, which was ably and insistently argued in response to what were felt to be abuses by this Court of its reviewing power, sought to limit the provision to a guarantee of procedural fairness. See *Davidson* v. *New Orleans*, 96 U. S. 97, 105; Brandeis, J., in *Whitney* v. *California*, 274 U. S. 357, at 373; Warren, The New "Liberty" under the 14th Amendment, 39 Harv. L. Rev. 431; Reeder, The Due Process Clause and "The Substance of Individual Rights," 58 U. Pa. L. Rev. 191; Shattuck, The True Meaning of The Word "Liberty" in Those Clauses of Federal and State Constitutions Which Protect "Life, Liberty and Property," 4 Harv. L. Rev. 365. The other view which has been rejected would have it that the Fourteenth Amendment, whether by way of the Privileges and Immunities Clause or the Due Process Clause, applied against the States only and precisely those restraints which had prior to the Amendment been applicable merely to federal action. However, "due process" in the consistent view of this Court has ever been a broader concept than the first view and more flexible than the second.

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. Com-

pare, *e. g.*, *Selective Draft Law Cases*, 245 U. S. 366; *Butler* v. *Perry*, 240 U. S. 328; *Kormatsu* v. *United States*, 323 U. S. 214. Thus the guaranties of due process, though having their roots in Magna Carta's "*per legem terrae*" and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation." *Hurtado* v. *California*, 110 U. S. 516, at 532.

However it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace the "fundamental rights of free men" *Corfield* v. *Corryell*, 4 Wash. 380, 386, for "the purpose [of securing] which men enter into society," *Calder* v. *Bull*, 3 Dall. 386, 388. Again and again this Court has resisted the notion that the Fourteenth Amendment is no more than a short-hand reference to what is explicitly set out elsewhere in the Bill of Rights. *The Slaughter House Case*, 16 Wall. 36, *Walker* v. *Sauvinet*, 92 U. S. 90; *Hurtado* v. *California*, 110 U. S. 516; *Presser* v. *Illinois*, 116 U. S. 252; *In re Kemmler*, 136 U. S. 436; *Twining* v. *New Jersey*, 211 U. S. 78; *Palko* v. *Connecticut*, 302 U. S. 319. Indeed the fact that an identical provision limiting federal action is found among the first eight Amendments, applying to the Federal Government, suggests that due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions. See *Mormon Church* v. *United States*, 136 U. S. 1; *Downes* v. *Bidwell*, 182 U. S. 244; *Hawaii* v. *Mankichi*, 190 U. S. 197; *Balzac* v. *Puerto Rico*, 258 U. S. 298; *Farrington* v. *Tokushige*, 273 U. S. 284; *Bolling* v. *Sharpe*, 347 U. S. 497.

Due process has not been reduced to any formula; its content cannot be determined by reference to any code.

The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property, the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, see *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Holden* v. *Hardy*, 169 U. S. 366; *Booth* v. *Illinois*, 184 U. S. 425; *Nebbia* v. *New York*, 291 U. S. 502;

Skinner v. *Oklahoma*, 316 U. S. 527, 544 (concurring opinion); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. Cf. *Skinner* v. *Oklahoma*, *supra*; *Bolling* v. *Sharpe*, *supra*.

As was said in *Meyer* v. *Nebraska*, 262 U. S., at 399, "this Court has not attempted to define with exactness the liberty thus guaranteed . . . without doubt it denotes not merely freedom from bodily restraint . . . ." Thus, for instance, when in that case and in *Pierce* v. *Society of Sisters*, 268 U. S. 530, the Court struck down laws which sought not to require what children must learn in schools, but to prescribe, in the first case, what they must *not* learn, and in the second, *where* they must learn it, I do not think it was wrong to put those decisions on "the right of the individual to . . . establish a home and bring up children," *Meyer* v. *Nebraska*, *ibid.*, or on the basis that "the fundamental theory of liberty upon which all governments in this union repose excludes any general power of the State to standardize the children by forcing them to accept instruction from public teachers only," *Pierce* v. *Society of Sisters*, at 535. I consider this so, even though today those decisions would probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment against federal encroachment upon freedom of speech and belief. See *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, and 656 (dissenting opinion); *Prince* v. *Massachusetts*, 321 U. S. 158, 166. For it is the purposes of those guarantees and not their text, the reasons for their statement by the Framers and not the statement itself, see *Palko* v. *Connecticut*, 302

U. S. 319, 324–327; *United States* v. *Carolene Prods.*, 304 U. S. 144, 152–153, which have led to their present status in the compendious notion of "liberty" embraced in the Fourteenth Amendment.

Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further [cut] a channel for what is to come." *Irvine* v. *California*, 347 U. S. 128, 147 (dissenting opinion). The matter was well put in *Rochin* v. *California*, 342 U. S. 165, 170–171:

> "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process .... These are considerations rooted in reason and in the compelling traditions of the legal profession." *Rochin* v. *California*, 342 U. S. 165, at 170–171.

On these premises I turn to the particular Constitutional claim in this case.

II.

Appellants contend that the Connecticut statute deprives them, as it unquestionably does, of a substantial measure of liberty in carrying on the most intimate of all

personal relationships, and that it does so arbitrarily and without any rational, justifying purpose. The State, on the other hand, asserts that it is acting to protect the moral welfare of its citizenry, both directly, in that it considers the practice of contraception immoral in itself, and instrumentally, in that the availability of contraceptive materials tends to minimize "the disastrous consequence of dissolute action," that is fornication and adultery.

It is argued by appellants that the judgment, implicit in this statute—that the use of contraceptives by married couples is immoral—is an irrational one, that in effect it subjects them in a very important matter to the arbitrary whim of the legislature, and that it does so for no good purpose. Where, as here, we are dealing with what must be considered "a basic liberty," cf. *Skinner* v. *Oklahoma*, *supra*, at 541, "there are limits to which the presumption of constitutionality can be pressed," *id.*, at 544, and the mere assertion that the action of the State finds justification in the controversial realm of morals cannot justify alone any and every restriction it imposes. See *Alberts* v. *California*, 354 U. S. 476.

Yet the very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior, and that which is purely consensual or solitary, would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form

a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis. Compare *McGowan* v. *Maryland*, — U. S. —.

It is in this area of sexual morality, which contains many proscriptions of consensual behavior having little or no direct impact on others, that the State of Connecticut has expressed its moral judgment that all use of contraceptives is improper. Appellants cite an impressive list of authorities who, from a great variety of points of view, commend the considered use of contraceptives by married couples. What they do not emphasize is that not too long ago the current of opinion was very probably quite the opposite,[12] and that even today the issue is not free of controversy. Certainly, Connecticut's judgment is no more demonstrably correct or incorrect than are the varieties of judgment, expressed in law, on marriage and

[12] The so-called Comstock Law, 17 Stat. 599, may be regarded as characteristic of the attitude of a large segment of public opinion on this matter through the end of the last century. It was only by judicial interpretation at a later date that the absolute prohibitions of the law were qualified to exclude professional medical use. *Youngs Rubber Co.* v. *Lee & Co.*, 45 F. 2d 103; *Davis* v. *United States*, 62 F. 2d 473; *United States* v. *One Package*, 86 F. 2d 737. 50 Harv. L. Rev. 1312. However, the Comstock Law in its original form "started a fashion" and many States enacted similar legislation, some of which is still on the books. See, Stone and Pilpel, The Social and Legal Status of Contraception, 22 N. C. L. Rev. 212; Legislation Note, 45 Harv. L. Rev. 723; Note, 6 U. of Chi. L. Rev. 260; Murray, America's Four Conspiracies at 32–33, in Religion in America (Cogley, ed.). Indeed the criticism of these measures assumes that they represented general public opinion, though of a bygone day. See, *e. g.*, Knopf, Various Aspects of Birth Control; Birth Control Clinical Research Bureau, Laws Relating to Birth Control in the United States and its Territories, foreward and introduction; Stone and Pilpel, *supra*; Hearings on H. R. 11082, 72 Cong. 1st Sess. See generally, Broun and Leech, Anthony Comstock; Dennett, Birth Control Laws.

divorce, on adult consensual homosexuality, abortion, and sterilization, or euthanasia and suicide. If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views. Cf. *Alberts* v. *California*, 354 U. S. 476, 500–503 (concurring opinion).

But, as might be expected, we are not presented simply with this moral judgment to be passed on as an abstract proposition. The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but the *choice of means* become relevant to any Constitutional judgment on what is done. The moral presupposition on which appellants ask us to pass judgment could form the basis of a variety of legal rules and administrative choices, each presenting a different issue for adjudication. For example, one practical expression of the moral view propounded here might be the rule that a marriage in which only contraceptive relations had taken place had never been consummated and could be annulled. Compare, *e. g.*, 2 Bouscaren, Canon Law Digest, 307–313. Again, the use of contraceptives might be made a ground for divorce, or perhaps tax benefits and subsidies could be provided for large families. Other examples also readily suggest themselves.

III.

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. Poten-

tially, this could allow the deployment of all the incidental machinery of the criminal law, arrests, searches and seizures; inevitably, it must mean at the very least the lodging of criminal charges, a public trial, and testimony as to the *corpus delicti*. Nor could any imaginable elaboration of presumptions, testimonial privileges, or other safeguards, alleviate the necessity for testimony as to the mode and manner of the married couples' sexual relations, or at least the opportunity for the accused to make denial of the charges. In sum, the statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy.

This, then, is the precise character of the enactment whose Constitutional measure we must take. The statute must pass a more rigorous Constitutional test than that going merely to the plausibility of its underlying rationale. See pp. —, —, *supra*. This enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of "liberty," the privacy of the home in its most basic sense, and it is this which requires that the statute be subjected to "strict scrutiny." *Skinner* v. *Oklahoma*, *supra*, at 541.

That aspect of liberty which embraces the concept of the privacy of the home receives explicit Constitutional protection at two places only. These are the Third Amendment, relating to the quartering of soldiers,[13] and the Fourth Amendment, prohibiting unreasonable searches and seizures.[14] While these Amendments reach

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[13] "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

[14] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

only the Federal Government, this Court has held in the strongest terms, and today again confirms, that the concept of "privacy" embodied in the Fourth Amendment is part of the "ordered liberty" assured against state action by the Fourteenth Amendment. See *Wolf* v. *Colorado*, 338 U. S. 25; *Mapp* v. *Ohio*, — U. S. —.

It is clear, of course, that this Connecticut statute does not invade the privacy of the home in the usual sense, since the invasion involved here may, and doubtless usually would, be accomplished without any physical intrusion whatever into the home. What the statute undertakes to do, however, is to create a crime which is grossly offensive to this privacy, while the Constitution refers only to methods of ferreting out substantive wrongs, and the procedure it requires presupposes that substantive offenses may be committed and sought out in the privacy of the home. But such an analysis forecloses any claim to Constitutional protection against this form of deprivation of privacy, only if due process in this respect is limited to what is explicitly provided in the Constitution, divorced from the rational purposes, historical roots, and subsequent developments of the relevant provisions.

Perhaps the most comprehensive statement of the principle of liberty underlying these aspects of the Constitution was given by Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U. S. 438, at 478:

> "The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred,

> as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. . . ."

I think the sweep of the Court's decisions, under both the Fourth and Fourteenth Amendments amply shows that the Constitution protects the privacy of the home against all unreasonable intrusion of whatever character. "[These] principles . . . . affect the very essence of constitutional liberty and security. They reach further than [a] concrete case . . . before the court with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life . . . ." *Boyd* v. *United States*, 116 U. S. 616, 630. "The security of one's privacy against arbitrary intrusion by the police—which is at the heart of the Fourth Amendment—is basic to a free society." *Wolf* v. *Colorado*, *supra*, at 27. In addition, see, *e. g.*, *Davis* v. *United States*, 328 U. S. 582, 587; *Oklahoma Press Pub. Co.* v. *Welling*, 327 U. S. 189, 202–203; *Frank* v. *Maryland*, 359 U. S. 360, 365–366; *Silverman v. United States*, 365 U. S. 505, 511.

It would surely be an extreme instance of sacrificing substance to form were it to be held that the Constitutional principle of privacy against arbitrary official intrusion comprehends only physical invasions by the police. To be sure, the times presented the Framers with two particular threats to that principle, the general warrant, see *Boyd* v. *United States*, *supra*, and the quartering of soldiers in private homes. But though "legislation, both statutory and constitutional, is enacted, . . . from an experience of evils, . . . its general language should not, therefore, be necessarily confined to the form that evil had

theretofore taken . . . . [A] principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems* v. *United States*, 217 U. S. 349, 373.

Although the form of intrusion here—the enactment of a substantive offense—does not, in my opinion, preclude the making of a claim based on the right of privacy embraced in the "liberty" of the Due Process Clause, it must be acknowledged that there is another sense in which it could be argued that this intrusion on privacy differs from what the Fourth Amendment, and the similar concept of the Fourteenth, were intended to protect: here we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind such a distinction is so insubstantial as to be captious: if the physical curtelage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within. Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. Thus, Mr. Justice Brandeis, writing of a statute which made "it punishable to teach pacificism in any place [to] a single person . . . no matter what the relation of the parties may be," found such a "statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience or conviction, and teach son or daughter the doctrine of pacificism. If they do, any police officer may summarily arrest them." *Gilbert* v. *Minnesota*, 254 U. S. 325, 335–336 (dissenting opinion). This same principle is expressed in the *Pierce* and *Meyer* cases, *supra*. These decisions, as was said in *Prince* v. *Massachusetts*, 321 U. S. 158, at 166, "have respected the

private realm of family life which the state cannot enter."

Of this whole "private realm of family life" it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations. We would indeed be straining at a gnat and swallowing a camel were we to show concern for the niceties of property law involved in our recent decision, under the Fourth Amendment, in *Chapman* v. *United States*, 365 U. S. —, and yet fail at least to see any substantial claim here.

Of course, just as the requirement of a warrant is not inflexible in carrying out searches and seizures, see *Abel* v. *United States*, 362 U. S. 217; *United States* v. *Rabinowitz*, 339 U. S. 56, so there are countervailing considerations at this more fundamental aspect of the right involved. "The family . . . is not beyond regulation," *Prince* v. *Massachusetts*, *supra*, and it would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy most manifestly is not an absolute. Thus, I would not suggest that adultery, homosexuality, fornication or incest are immune from criminal enquiry, however privately practiced. So much has been explicitly recognized in acknowledging the State's rightful concern for its people's moral welfare. See pp. —, *supra*. But not to discriminate between what is involved in this case and either the traditional offenses against good morals or crimes which, though they may be committed anywhere, happen to have been committed or concealed in the home, would entirely misconceive the argument that is being made.

Adultery, homosexuality and the like are sexual intimacies which the State forbids altogether, but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It

is one thing when the State exerts its power either to forbid extra-marital sexuality altogether, or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.

In sum, even though the State has determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality, the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy, is surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection.

In my view the appellants have presented a very pressing claim for Constitutional protection. Such difficulty as the claim presents lies only in evaluating it against the State's countervailing contention that it be allowed to enforce, by whatever means it deems appropriate, its judgment of the immorality of the practice this law condemns. In resolving this conflict a number of factors compel me to conclude that the decision here must most emphatically be for the appellants. Since, as it appears to me, the statute marks an abridgment of important fundamental liberties protected by the Fourteenth Amendment, it will not do to urge in justification of that abridgment simply that the statute is rationally related to the effectuation of a proper state purpose. A closer scrutiny and stronger justification than that are required. See pp. ——, ——, *supra*.

Though the State has argued the Constitutional permissibility of the moral judgment underlying this statute, neither its brief, nor its argument, nor anything in any of the opinions of its highest court in these or other cases

even remotely suggests a justification for the obnoxiously intrusive means it has chosen to effectuate that policy. To me the very circumstance that Connecticut has not chosen to press the enforcement of this statute against individual users, while it nevertheless persists in asserting its right to do so at any time—in effect a right to hold this statute as an imminent threat to the privacy of the households of the State—conduces to the inference either that it does not consider the policy of the statute a very important one, or that it does not regard the means it has chosen for its effectuation as appropriate or necessary.

But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime.[15] Indeed, a diligent search has revealed that no nation, including several who quite evidently share Connecticut's moral policy,[16] has seen fit to effectuate that policy by the means presented here.

Though undoubtedly the States are and should be left free to reflect a wide variety of policies, and should be allowed broad scope in experimenting with various means of promoting those policies, I must agree with Justice Jackson that "there are limits to the extent

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[15] See tabulation of statutes in Birth Control Legislation, 9 Cleveland Marshall Law Review, 245, (1960); Legislative Note, 45 Harv. L. Rev. 723 (1932); Birth Control Clinical Research Bureau, Laws Relating to Birth Control in the United States and its Territories (1938).

[16] Unqualified disapproval of contraception is implicit in the laws of Belgium, Droit Penal § 383; France, Code Penal Art. 317; Ireland, Censorship of Publications Act of 1929 §§ 16, 17, Criminal Law Amendment Act of 1935, § 17; Italy, Codice Penale Art. 553, 555; and Spain Codigo Penal, Art. 416. Compare the more permissive legislation in Canada, Criminal Code, § 150; Germany, Strafgesetzbuch § 184 (2); and Switzerland, Code Penal Art. 211.

to which a legislatively represented majority may conduct . . . experiments at the expense of the dignity and personality" of the individual. *Skinner* v. *Oklahoma*, *supra*. In this instance these limits are, in my view, reached and passed.

I would adjudicate these appeals and hold this statute unconstitutional, insofar as it purports to make criminal the conduct contemplated by these married women. It follows that if their conduct cannot be a crime, appellant Buxton cannot be an accomplice thereto. I would reverse the judgment in each of these cases.

SUPREME COURT OF THE UNITED STATES

Nos. 60 and 61.—October Term, 1960.

Paul Poe, et al., Appellants, 60 v. Abraham Ullman, State's Attorney. Jane Doe, Appellant, v. Abraham Ullman, State's Attorney. C. Lee Buxton, Appellant, 61 v. Abraham Ullman, State's Attorney.	On Appeals From the Supreme Court of Errors of Connecticut.

[June 19, 1961.]

Mr. Justice Stewart, dissenting.

For the reasons so convincingly advanced by both Mr. Justice Douglas and Mr. Justice Harlan, I join them in dissenting from the dismissal of these appeals. Since the appeals are nonetheless dismissed, my dissent need go no further. However, in refraining from a discussion of the constitutional issues, I in no way imply that the ultimate result I would reach on the merits of these controversies would differ from the conclusions of my dissenting Brothers.